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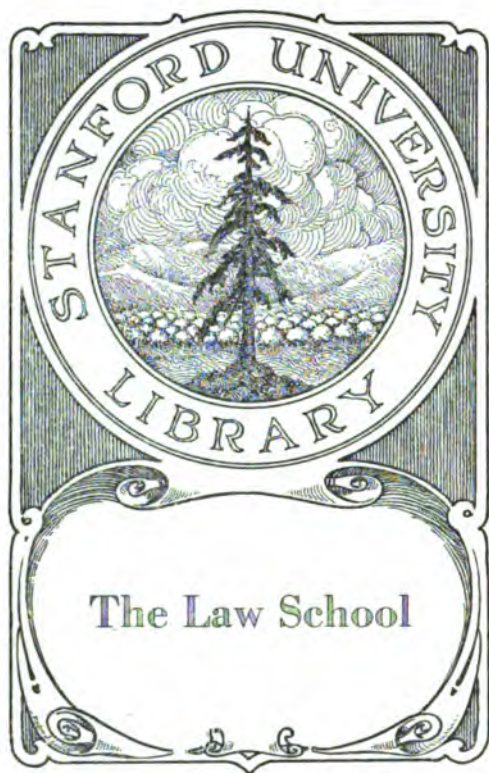
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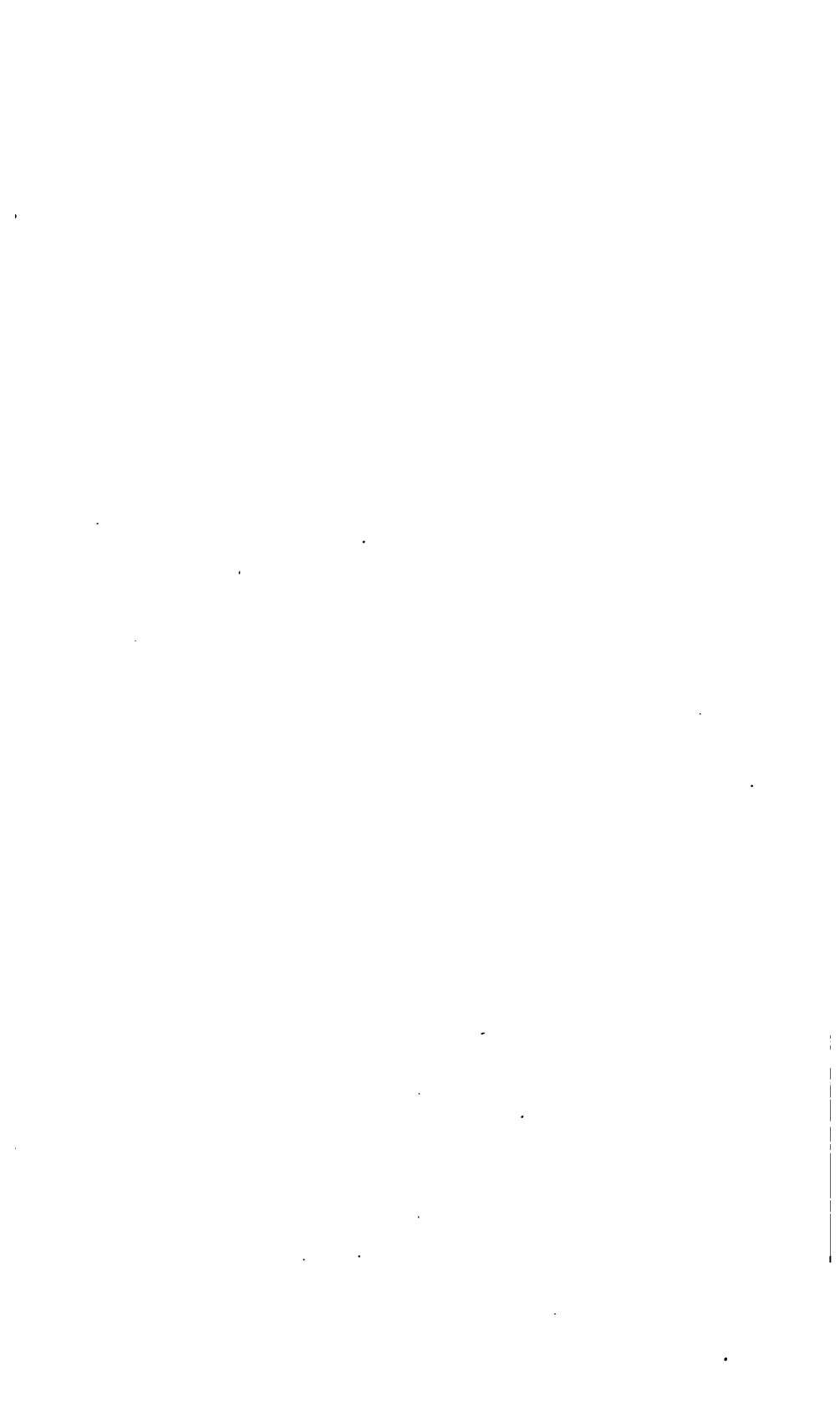
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JUDGES
OF THE
COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.

Sir JOHN PATTESON, Knt.

Sir JOHN TAYLOR COLERIDGE, Knt.

Sir WILLIAM WIGHTMAN, Knt.

Sir WILLIAM ERLE, Knt.

ATTORNEY-GENERAL.

Sir JOHN JERVIS, Knt.

SOLICITORS-GENERAL.

Sir DAVID DUNDAS, Knt.

Sir JOHN ROMILLY, Knt.



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CASES
ARGUED AND DETERMINED
THE QUEEN'S BENCH,

Michaelmas Term and Vacation,

XL VICTORIA. 1847.

The judges who usually sat *en banc* in this term and vacation were:

Lord DENMAN, C. J.

WIGHTMAN, J.

COLERIDGE, J.

ERLE, J.

HERNOD v. WILKIN and Another. Nov. 2.

In *assumpsit* by ship-owner against charterer for not loading the ship with a homeward cargo pursuant to charter-party, and detaining her over the running days thereby allowed, the first count, after setting out the charter-party, alleged that, after it was made, the parties signed an endorsement thereto, altering the terms of the delivery of the outward cargo and adding to the number of running days. A second count was framed on the charter-party without the endorsement.

A Judge, on summons to show cause why one count should not be struck out, endorsed that no order should be made, he being satisfied that it was intended *bonâ fide* to establish a distinct subject-matter of complaint in respect of each count.

On the plaintiff moving to strike out so much of the endorsement as stated that the Judge was satisfied, &c., upon affidavit that it had not been suggested that two distinct subject-matters of complaint were to be established,

This court refused to interfere with the discretion of the Judge; but said that it was not to be considered as their opinion that the plaintiff might not declare on the contract, both as it originally stood and as altered, or that he would lose his costs if he succeeded on one only, but satisfied the Judge *à Nisi Prius* that he acted on a *bonâ fide* intention of establishing two subject-matters of complaint.

ASSUMPSIT. The first count alleged that, plaintiff being owner of a vessel called the *Doubletten*, lying in the Thames, by a charter-party between the *master, as agent for plaintiff, and the defendant, it was agreed that the ship should with all convenient speed proceed [*2 to London Dock, or as near thereto, &c., and there load from the factors of the affreighters, to wit, of defendants, a cargo, and proceed to Alexandretta, to unload the whole or part, or proceed to Beirut to unload,

and, being unloaded, should there or at Smyrna load a full and complete cargo of lawful merchandise for merchants' benefit, charterers finding mats, &c., and then proceed to a safe port on the continent between Havre, &c., and deliver, on being paid freight, &c.; the ship to address to charterers' agents at the ports of loading and discharge (the act of God, &c., excepted): freight to be paid on unloading and delivery of cargo, sufficient in cash for ship's disbursements there, to wit, at London, and at every other place, remainder in good bills, &c.: sixty running days to be allowed the merchant (if the ship was no sooner despatched) for loading in London, reloading and final discharging: the cargo from London to be unloaded according to the custom of the port and ten days on demurrage, over and above the said laying days, at 4*l.* per day: the charterers to have the option to order the vessel from the port of loading in the Levant to Marseilles, where, in that case, the voyage was to finish: and it was further agreed that the charterers "should have the option of ordering the vessel to a safe port in the United Kingdom:" Averment, that the ship did, with all convenient speed, proceed to London, and there loaded from the factors of defendants a full and complete cargo, and fifty-eight days were expended in loading as aforesaid: "And, the said charter-party being so made as aforesaid, afterwards, to wit, on," &c., "by a certain endorsement then made and written upon the said *3] charter-party, and signed" by *the master so acting on behalf of plaintiff and by defendants, "it was agreed between the contracting parties that, instead of the cargo at Alexandretta and Beirout being taken out according to the custom of those ports, the entire cargo should be taken out within ten working days, reckoned for both places inclusive, and that all time beyond that period was to be accounted lay days, subject to demurrage stipulated; and, on the other hand, in consideration thereof," the master, so acting as aforesaid, "by the terms of the said endorsement, agreed to extend the term of sixty running days to seventy-five running days, or fifteen days beyond the first agreement, for the purposes in the said charter-party mentioned, he having, as compensation, received there, to wit, at," &c., "the sum of 30*l.*: which said endorsement was also, by the terms thereof, expressed to be without prejudice to all the other clauses in the said charter-party. And, the said charter-party and endorsement being so made as aforesaid," &c.: averment of mutual promises to perform the terms of the charter-party. That the ship proceeded to Alexandretta and Beirout, according to the terms of the charter-party and endorsement and the orders of defendants, and afterwards unloaded and discharged the cargo, part at Alexandretta and part at Beirout, according to the orders of defendants, the ship being addressed to the agents of the charterers at A. and B. respectively; and afterwards proceeded, according to the orders of the defendants, to Smyrna, in order to load such cargo as in the charter-party mentioned, and arrived at Smyrna, and was then addressed to the agents of the

charterers, and was ready to take on board such cargo, &c., according to the terms of the charter-party, and proceed therewith to any safe port *on the continent between Havre, &c., or to Marseilles, or to any safe port in the United Kingdom, at the option of the charterers [*4 or their agents; of all which the defendants and their agents had notice; and the master requested the agents to load the ship, or procure such cargo, according to the terms of the charter-party. Averment: that plaintiff had performed the terms of the charter-party and endorsement on his part; but defendants did not, nor did their agents, load the ship at Smyrna, or procure a cargo, according to the terms of the charter-party; and, although the agents detained the ship at Smyrna, for the alleged purpose of taking on board such return cargo, for a long space, &c., after she was ready to take such cargo, and they had notice thereof, yet they during that time failed to procure such return cargo, and, at the expiration thereof, refused to do so, and refused to order the ship to any safe port between Havre, &c., or to Marseilles, or to any other safe port in the United Kingdom; the omission, &c., not being caused by the act of God, &c. That at Smyrna 30*l.* was required for the necessary disbursements of the ship, of which defendants and their agents had notice, and were requested to disburse the same to the master on account of the freight, of which a small part only had been advanced, not sufficient for the disbursements; but defendants and their agents would not pay the sum requisite, nor sufficient for the disbursements: and that such neglect, &c., was not occasioned by the act of God, &c. Allegation of damage, and that the days of detention at Smyrna, together with the days expended at London, exceeded the seventy-five running days in the endorsement mentioned, to wit, by the number of days which the ship was to be kept on demurrage, to wit, ten days, *whereby 40*l.* became payable by defendants to plaintiff, which defendants had not paid. [*5 Various allegations of damage were added.

There was a second count framed on the charter-party without noticing the endorsement.

Defendants took out a summons to show cause why the first or the second count should not be struck out at the cost of plaintiff, "the same being in violation of the new rules of pleading, being founded on one and the same principal matter of complaint, varied in statement, description or circumstance only, unless the plaintiff undertakes to establish a distinct subject-matter of complaint in respect of both counts." The summons was heard before PLATT, B., who endorsed the summons as follows: "No order: being satisfied that a distinct matter of complaint is bona fide intended to be established in respect of each of the counts. T. J. P." On affidavit stating the above facts, and that it was not suggested before the learned Baron that the plaintiff intended to establish two distinct matters of complaint in respect of the two counts, but only that the two counts were not in apparent violation of the new rules,

Rew, for the plaintiff, now moved(a) for a rule to show cause why so much of the endorsement as signified that the learned Baron was satisfied, &c. (as in the order), should not be rescinded or struck out. This is the stage of the cause at which the objection should be taken; *Dewar v. Swabey*, 11 A. & E. 913, 916, 917. The power to make an order in this form is given by R. G. Hil. 4 W. 4, General Rules and Regulations,

*6] 6:(b) "where more than one count," &c. *"shall have been used, in apparent violation of the preceding rule" (5),(c) which provides that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each." There is no such apparent violation in this case: on the face of the counts, the contracts are distinct: it is not necessary that there should have been two transactions: *Temple v. Keily*, 1 M. & G. 904. [ERLE, J. Does not the altered contract supersede the original contract?] That may be so; and that would disable the plaintiff from saying that there was a bonâ fide intention to establish a distinct matter of complaint in respect of each of the counts. But there is no "apparent violation" of the 5th rule. The case is, in principle, like *Gilbert v. Hales*, 2 D. & L. 227.(d) [ERLE, J. Could you have a verdict on both counts?] No. [ERLE, J. Then, as you do not know on which count you will succeed, you insert two counts; that seems to be an apparent violation of the rule.] In *Hemming v. Trenery*, 9 A. & E. 926, there were two counts, one on the contract as originally made, the other on the same contract as altered. It is true that the question as to the allowance of the two was not there expressly decided. In *James v. Bourne*, 4 New Ca. 420, 423, TINDAL, C. J., said: "I think it" (the rule) "means that, if there be a second and distinct contract in respect of the same subject-matter, the count on such contract may stand, and that it would be an unnecessary extension of the rule to strike it out." *Our. adv. vult.*

Lord DENMAN, C. J., on a later day in this term (November 16th), delivered the judgment of the Court.

*7] "In this case, we think that we ought not to interfere with the discretion exercised by the learned judge in making the endorsement that a distinct matter of complaint is intended to be established in respect of each count; and, therefore, there will be no rule. Still it must not be understood to be our opinion, either that a plaintiff is precluded from declaring both upon the original contract and upon the altered contract in separate counts, when the facts are as they were alleged to be in this case, or that the present plaintiff incurs any risk of losing his costs by reason of the endorsement complained of, if he shall succeed upon one count only, and also shall satisfy the Judge that he acted on the grounds that have been alleged before us. Rule refused.

(a) Before Lord DENMAN, C. J., COLBRIDGE, WIGHTMAN, and ERLE, J.

(b) 5 B. & Ad. iv.

(c) 5 B. & Ad. ii.

(d) See *Bulmer v. Bousfield*, 9 Q. B. 986.

TEW v. HARRIS. Nov. 3.

Assumpsit on an agreement, between the plaintiff and defendant, that plaintiff should sell and defendant purchase crops at a valuation to be made by two persons, one named by each party, and, if such persons disagreed, by a third person to be named by them before entering on the valuation; that each party should appoint a referee by 31st May; and if either should neglect to appoint, the referee of the other alone might make a final decision; and, in case either party or his referee should neglect to attend any reference after notice, the party or the referee attending should enter upon the reference ex parte and make a final decision: the valuation to be made by 3d June. The declaration alleged that on 31st May plaintiff appointed a referee, and gave notice thereof to defendant a reasonable time before 3d June, but no appointment, of which plaintiff had notice, was made by defendant; and plaintiff, a reasonable time before 3d June, gave defendant notice of the intention of plaintiff's referee to proceed in the valuation on 2d June; but defendant did not attend, wherefore plaintiff's referee valued at a sum named; which defendant, though requested, had not paid. Plea: that plaintiff did not, within the time appointed, appoint his said referee, in manner, &c.

It appeared at Nisi Prius that, under the above agreement, plaintiff did nominate his referee late on 31st May, and sent by that night's post a notice thereof to defendant, who received it on 1st June. Held, that the issue on the plea must be found for defendant, since the appointment was not complete without notice thereof to the opposite party.

ASSUMPSIT. The first count charged that heretofore, to wit, 25th May, 1847, by agreement in writing, then entered into, between plaintiff of the one *part and defendant of the other part, plaintiff agreed to sell, and defendant to purchase, at a valuation to be made as [*8 after mentioned, the crops upon a piece of land therein mentioned, the price to be paid on 5th June, 1847, the valuation to be made by two persons, one named by each party to the agreement, and, if the said two persons should disagree, then by a third person to be named by them before entering upon the reference or valuation: and it was thereby also agreed that such valuation should be made by 3d June, 1847; and that each of the parties should, by 31st May, 1847, appoint a referee; and that, in case either party should neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone might make a final decision; and that, in case either party, or the referee of either party, should neglect or omit to attend any reference after notice in writing given or left at the last known place of abode of such party or referee, then the party or referee attending should enter upon the reference ex parte, and make a final decision. Averment, that plaintiff had in every respect fulfilled the agreement on his part. That afterwards, and within the time in that behalf appointed as aforesaid, to wit, on the said 31st May, plaintiff, in all things according to the said agreement in that behalf, nominated and appointed a certain person, to wit, John Coudrey, the said J. C. being a fit and proper person in that behalf, to be his referee and valuer, to wit, to make the valuation aforesaid on his, plaintiff's, part, according to the agreement, and then, and a reasonable time before the said 3d June, to wit, on the same day and year aforesaid, gave due notice to defendant of such appointment and nomination. That no appointment or nomination by *defendant of any person as referee on the part of defendant, [*9 according to the agreement, whereof plaintiff had any notice, was,

within the time so in that behalf appointed as aforesaid, made. And thereupon plaintiff afterwards, to wit, on 31st May, 1847, and a reasonable time before the day next after mentioned, did, in pursuance of the agreement, cause notice in writing to be given to defendant, to wit, by leaving the same at his last known place of abode, of the intention of J. C. to proceed in the said valuation at the hour of ten of the clock on a day therein named, being a day after the said 31st May, and before the said 3d June, to wit, on 2d June, 1847, according to the agreement in that behalf. That defendant wholly omitted to attend the making of the said valuation: and thereupon J. C., at the time so appointed as last aforesaid, as and being the referee and valuer nominated and appointed as aforesaid, did enter upon the said reference *ex parte*, and did then proceed to make, and did then make, his final decision of the value of the said crops, in all respects according to the true intent of the agreement, and did then find, award, and finally decide that the same were of the true value of 132*l.* 4*s.*, the same being a reasonable and proper valuation and sum in that behalf: of all which premises defendant then, and a reasonable time in that behalf before the said 5th June, to wit, on the day and year last aforesaid, had notice, and was then requested by plaintiff to pay him the said sum of money. Breach: that, although such last-mentioned day hath long since elapsed, and more than a reasonable time for that purpose, after such notice and before the commencement of this suit, had elapsed, no part of the money hath been paid.

*10] *Plea 2, to first count. That plaintiff did not, within the time appointed, or according to the said agreement, nominate or appoint Coudrey to be his referee, in manner and form, &c.: conclusion to the country. Issue thereon. There were other issues of fact, not here material.

On the trial, before Lord DENMAN, C. J., at the last Warwick assizes, it appeared that on Monday the 31st May, at seven or eight in the afternoon, the plaintiff who resided at Walsall, about ten miles from Birmingham, nominated Coudrey his referee; and, by that evening's post, the plaintiff's attorney sent from Birmingham a letter to the defendant, whose then residence was at Gloucester, informing him of the appointment, and adding, on behalf of Coudrey: "Mr. Coudrey is prepared to meet your valuer, for the purpose of naming a third party as referee. If Mr. Coudrey is not informed by ten o'clock, A. M. on Wednesday next, the 2d June, whom you have appointed as valuer, he will, after that hour, proceed in the valuation alone." The defendant received this letter on 1st June. No answer being given, and no person appearing on the part of the defendant, Coudrey on 3d June made the valuation *ex parte*. It was objected that, inasmuch as the notice of nomination had not been communicated to defendant until after 31st May, the issue on the second plea must be found for him. His Lordship was of that opinion, and directed a verdict accordingly, reserving leave to move to

enter a verdict for the plaintiff. On the other issues a verdict was found for the plaintiff.

Whitehurst now moved in pursuance of the leave reserved. The appointment was in fact made on the day *named in the agreement: and the plaintiff, on that day, did all he could to communicate it to [*11 the defendant. He had, by the agreement, till twelve at night to make the appointment. If it be held that he was bound to take care that notice reached the defendant on that day, it will follow that he had less than the whole day for making the appointment; and, if the defendant were so far off that the notice could not possibly reach him on the day of the appointment, it would be necessary to construe the agreement as requiring the appointment to be made before 31st May.

COLERIDGE, J. It appears to me that there ought to be no rule in this case, and that my Lord's direction was right. Each of the parties was to nominate a referee on a certain day. Now what is a nomination? Mr. *Whitehurst* contends that, as each had the whole of the 31st of May for making the nomination, the agreement could not require that the nomination of one party should be communicated to the other on that day. But it seems to me that there was no effective nomination till the notice was given to the other party. For, though one party might, on hearing who the referee of the other party was, be satisfied with the referee whom he had selected for himself, yet the meaning of the agreement here must have been to include all cases. Each was to know who the referee of the other was. Otherwise, each might have nominated the same person, or one might have nominated a person to whom the other had a valid objection. But Mr. *Whitehurst* argues that, upon this construction, a part of the last day is lost. That, in truth, is to assume that his own construction is right; because the agreement imports that *each is to have to the end of the 31st of May to do all that completes the nomination; and the last step must therefore be taken [*12 on or before that day.

WIGHTMAN, J. I am of the same opinion. The agreement could hardly mean that each party was to name, without communicating to the other party, his own referee. If so, there would be no opportunity of appointing a new referee in case the one before selected appeared objectionable, nor indeed any opportunity of knowing that an appointment had taken place.

ERLE, J. It seems to me that this case was properly decided. The question is, whether a referee is nominated by merely telling him that he is nominated. The defendant says that this is not so, and that a necessary step in the nomination was to communicate the appointment to the other party: and it is clear to me that the agreement did contemplate such a communication. It stipulated that the two referees were to meet by the 3d of June, and that an umpire was to decide between them in case of their differing. If Mr. *Whitehurst* be right, the plain-

tiff need not have communicated the nomination even on the 1st or 2d of June, but might have brought his referee, without notice, to the ground on the 3d of June. The intention of the agreement could not have been so carried out.

Lord DENMAN, C. J. Clearly, to bind one party with respect to the opposite party, something should take place authorizing the one to consider that the other has made his nomination. Rule refused.

*13] *M'EWEN v. WOODS and Others. Nov. 3.

Plaintiff employed defendants, brokers, to buy for him thirty shares, scrip, in a railway company for which an act of parliament had lately been obtained. Defendants purchased in their own names, the practice of brokers being such; and plaintiff paid them the price. The scrip was purchased "for account, 29th of August," but could not be then delivered, the scrip having in the mean time been called in by the directors to be registered, in order that shares might be issued. Before the shares came out, a call was made. These facts were known to the plaintiff; but he from time to time desired to have the scrip forwarded without further delay. The share certificates came out in December; and then the selling brokers tendered the shares to the defendants, with a demand of 150*l.* for the call. Plaintiff, on being applied to, refused to furnish the 150*l.*, denying his liability, and claiming the shares without such payment; and, on their being withheld, he repudiated the contract, and brought an action for money had and received.

Held, that the non-delivery of the scrip on the 29th August did not entitle him to recover his purchase-money.

ASSUMPSIT for money had and received to plaintiff's use. Pleas, Non assumpsit, on which issue was joined; and a set off for money paid, &c., on which nothing now turns.

On the trial, before CRESSWELL, J., at the Liverpool Summer assizes, 1846, it appeared that the action was brought to recover 148*l.* 10*s.* under the following circumstances. On 14th August, 1846, the defendants, who were share brokers at Liverpool, purchased for the plaintiff, at his request, for the 29th August, being the next account day, thirty scrip shares in the Limerick and Waterford Railway. The purchase was made by the defendants in their own names, according to the practice of the Liverpool Share Market. The contract note, transmitted by them to plaintiff, dated August 14th, was: "Bought for J. M'Ewen, Esq., for a/c, 29th August, thirty shares," &c., "at," &c., "146*l.* 5*s.* Commission, 1*s.* 6*d.* - - - - - 2*l.* 5*s.*

148*l.* 10*s.*"

On 26th August, plaintiff wrote in answer: "Enclosed I now send you bank letter of credit for 148*l.* 10*s.*, being the amount of thirty shares Limerick," &c., "bought by you on my account, of which please *14] *acknowledge receipt, and at the same time forward the scrip."

The letter of credit was enclosed.

The defendants did not deliver the shares on the 29th, and were unable to do so, in consequence of the scrip having been called in by the

directors on 22d August for the purpose of registration and reissuing sealed share certificates in lieu thereof. On the 28th August, a call was made of 5*l.* a share, payable on 27th September. The brokers of whom the defendants had purchased paid this call. It appeared, by correspondence between the parties, that the defendants had apprised the plaintiff of the cause of delay; that he also knew of the call being made; and that he had, down to December 19th, pressed the defendants to forward the scrip immediately. The registration was not completed until the middle of December; the sealed certificates were then issued, and tendered to the defendants by the selling brokers, with a demand of 150*l.* for the call, in addition to the purchase-money.^(a) The defendants, on 19th December, gave notice to the plaintiff that the shares were ready, subject to payment of the call. On 29th December, the plaintiff, by letter, repudiated the contract, and demanded back his purchase-money. Upon this the defendants declined to accept the shares. On 14th January, the selling brokers, who had by that time paid a second call of 5*l.* a share, sold the shares out against the defendants, at a loss of 226*l.*, which was paid them by the defendants. This action was brought to recover back the amount of the plaintiff's purchase-money;^(b) and a verdict for that amount was *taken, under the direction of the learned Judge, who gave the defendants leave to move to enter a [*15 nonsuit.

Knowles, in Michaelmas term last, obtained a rule nisi accordingly.

Martin and *Cowling* showed cause,^(c) and contended that the plaintiff had a right to repudiate the contract on the failure of the defendants to deliver the shares by the stipulated time. They cited *Fletcher v. Marshall*, 15 M. & W. 755.

Knowles and *Crompton*, contra. The 148*l.* 10*s.* was not, in the first instance, money had by the defendants to the use of the plaintiff, but to their own use, to reimburse them for the amount in which they had become liable to the selling brokers. It may be that a sum which was originally given for the purpose of absolute payment may be recovered as money had and received, if circumstances show that the intended application ought to be revoked, and a revocation is practicable; *Buller v. Harrison*, 2 Cowp. 565: but that was the case of an agent; and the essential question was whether the money could be considered as still remaining in the agent's hands. Here, the defendants have dealt as principals with a third party, and brought themselves under a binding obligation. The plaintiff could not countermand the application of the money, by which that obligation was to be fulfilled. He must be taken to have authorized whatever the defendants did conformably to the rules

(a) See stat. 3 & 4 Vict. c. 16, s. 16.

(b) See, further, as to the facts proved, the judgment of the Court, p. 16, post.

(c) The case was partly heard in Trinity term last (June 9th) by Lord DENMAN, C. J., PATTERSON, COLERIDGE, and ELLIS, J., and partly on this day by Lord DENMAN, C. J., COLERIDGE, WILKINSON, and JENNY, J.

of the market: *Sutton v. Tatham*, 10 A. & E. 27. In *Fletcher v. Mar-*
 *16] shall, the defendants had made it impossible to *employ the money
 as they were commissioned to do; the course they had taken was
 absolutely wrong: here, the defendants have incurred a responsibility
 to third parties, which creates a difficulty in settling with the plaintiff;
 but it was unavoidable; and the plaintiff cannot take advantage of it.
 It appears by the correspondence that the plaintiff, as well as the defend-
 ants, knew the whole state of the transaction, and looked upon the con-
 tract as still subsisting between them, down to the repudiation. The
 defendants are in fact entitled to sue the plaintiff for money paid.

Cur. adv. vult.

Lord DENMAN, C. J., at the sittings after this term (December 7th),
 delivered the judgment of the Court.

This was a rule to enter a nonsuit on the ground that, upon the facts,
 the action for money had and received could not be sustained.

The defendants, who were share brokers in partnership at Liverpool,
 had bought for the plaintiff, on the 14th August, in pursuance of
 instructions from him, thirty Limerick and Waterford scrip shares, to
 be delivered on the next account day, which was to be on the twenty-
 ninth of August, at the price, including their commission, of 148*l.* 10*s.*
 This sum the plaintiff transmitted to the defendants on the *twenty-sixth*
 of August by letter, and requested them to acknowledge the receipt, and
 at the same time to forward to him the scrip. On the *twenty-second* of
 August the Railway Company had called in the scrip for registration,
 which made a delivery to or by the defendants impossible. Upon regis-
 tration, the scrip is turned into shares, and re-issues in the form only of
 *17] sealed certificates, which are *transferable only by deed. The re-
 gistration and re-issuing were not completed till the middle of De-
 cember: and in the mean time the Company had made a call of 5*l.* per
 share, which was necessarily paid by the party selling to the defendants;
 and he presented the shares to them with the additional demand for the
 call. The plaintiff repudiating the transaction, they declined to accept;
 and the shares were resold at a loss of 226*l.*, which the defendants paid
 to the original seller. The action is brought to recover the 148*l.* 10*s.*

From the correspondence put in, it appeared that the plaintiff was
 apprised in due time of the scrip having been called in and the call made,
 and also that the call must be repaid to the seller before the certificates
 would be delivered. From the same correspondence, and the evidence,
 we think it must be taken that the defendants purchased in their own
 names, and were themselves personally responsible to the sellers.

The money, therefore, was transmitted to the defendants to enable them
 to meet the liability which they had incurred at the request of the plain-
 tiff and on his account. It was not, therefore, received in the first
 instance to his use. But it was urged that the defendants by their own
 misconduct had produced a failure of the original consideration for which

the money was sent; and this misconduct was said to consist in their having of their own wrong given time to the seller for the delivery of this scrip, which by the contract was to be delivered as such on the 29th August. But there is no foundation for this. In fact, the non-delivery on the 29th August, and all the consequences which followed, were owing to circumstances over which neither party had any control; and there is abundant evidence that *the plaintiff was aware of those circumstances, and understood the contract made to be subject to [*18 them. The reasonable interpretation of the contract is, that it was for delivery of scrip on the 29th August if not then called in, otherwise of share certificates as soon as they should be re-issued.

Accordingly, if the plaintiff would have enabled them to pay for the shares when re-issued, by supplying funds to meet the call with which they had become saddled in the mean time, the defendants must have applied the money received for that purpose; and, if they had neglected, it would have become money in their hands to the plaintiff's use. But he has wrongfully neglected to do so; and they have been compelled to add their own money to his in order to fulfil their contract. For the re-selling of the shares on their account by the original seller and their payment of the loss is only another mode of so doing.

Upon these facts we think the action not maintainable, and that the rule must be absolute. Rule absolute.(a)

(a) Part of this report is by H. Davison, Esq.

*ABSOLON v. MARKS. Nov. 3.

[*19

Assumpsit on a promissory note, stated to have been made by defendant, and endorsed by him to plaintiff, defendant pleaded, after setting out the alleged note, by which the defendant and four other persons jointly and severally promised to pay 750*l.* "to our and each of our order," that the endorsement was made by defendant alone. Replication: that the endorsement was by defendant jointly with the other four. Issue thereon. Verdict for plaintiff. On motion in arrest of judgment, on the ground that such instrument was uncertain as to the payee, and therefore not a note within stat. 3 & 4 Ann. c. 9, s. 1:

Held, that the note when endorsed became certain; and, the record showing that defendant had endorsed, enough appeared to warrant a judgment for plaintiff.

ASSUMPSIT. The declaration stated that defendant, on January 7th, 1843, made his promissory note in writing, and thereby promised to pay to his own order 750*l.*, six months after the date, &c., and then endorsed the said note to plaintiff, and promised plaintiff to pay the same according to the tenor and effect thereof, and of the said endorsement. Breach, non-payment.

Plea. That the note in the declaration mentioned was and is in the words and figures following, viz.

750*l.* 0*s.* 0*d.*

London, January 7th, 1843.

Six months after date we jointly and severally promise to pay to our

and each of our order the sum of seven hundred and fifty pounds for value received.

ROBERT MARKS, ROBERT BISHOP,
JOHN HUTTON, EDWARD HODGES,
JOHN WILSON.(a)

Payable at Sir Claude
Scott & Co., Cavendish Square.

And defendant says that the said promissory note was, on the said 7th day, &c., made as well by the defendant as the said persons in the said promissory note called Robert Bishop, John Hutton, John Wilson, *20] and Edward Hodges, who were and are real persons: And *the defendant further says that the said endorsement in the said declaration mentioned was an endorsement in blank, and not a special endorsement or endorsement in full, and was an endorsement by the defendant alone. Verification.

Replication. That the said endorsement in the said declaration mentioned was a joint endorsement, that is to say, an endorsement by the defendant and jointly with the said persons in the said promissory note called R. B., J. H., J. W., and E. H., and not an endorsement by the defendant alone, in manner and form, &c. Issue thereon.

On the trial, before PARKE, B., at the Summer assizes at Maidstone, 1846, a verdict was found for the plaintiff. *Peacock*, in the ensuing term, obtained a rule to show cause why judgment should not be arrested, on the ground that the note declared upon was not a negotiable instrument within stat. 8 & 4 Ann. c. 9, s. 1; or why a replender should not be awarded. He mentioned *Wood v. Mytton*, 10 Q. B. 805, and *Brown v. De Winton*, 6 C. B. 336, in which motions were depending in this Court and the Common Pleas on similar points.

Crowder, who was to show cause,(b) now cited *Wood v. Mytton*, 10 Q. B. 805, where, since the granting of this rule, it was decided that a note promising to pay to the maker's own order, and endorsed by him, is within the statute.

Peacock was then called upon by the Court to support his rule. In *21] *Wood v. Mytton*, 10 Q. B. 805, the note was made by one *person, payable to his own order, and endorsed by him. 'Here several profess to make the note, payable "to our and each of our order." [Lord DENMAN, C. J. Why may not an endorsee sue one of the "each?"] The question is, whether the instrument, so drawn, is a note within the statute. A note was held not to be so, where the promise was to pay "to J. P. Damer" or to the plaintiffs, or to his or their order;" *Blanckenhagen v. Blundell*, 2 B. & Ald. 417. The present note being payable to the order of all or each, there is at least an uncertainty till it is ascertained who endorses. And several persons might claim to be separately entitled by endorsement from the different makers. Here,

(a) The note produced at the trial was endorsed with the names of these five parties, to which nothing was added.

(b) Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, J.

too, the endorsement, in point of fact, was in blank, which was not the case in *Wood v. Mytton*. [Lord DENMAN, C. J. The motion before us is not made on that ground.]

Crowder and Wordsworth, contra. The case does not materially differ from *Wood v. Mytton*. (a) There is no uncertainty; or, if there is any, it is removed by the endorsement. If one only of the makers has endorsed, he may be sued; if all have endorsed, all may. The note differs essentially from that in *Blanckenhagen v. Blundell*; the promise is by several to pay "to our and each of our order;" there it was to pay to D. or to the plaintiffs: here it depended on the makers themselves to render the promise certain; and, if one or more of the makers have endorsed, it is not for them to say afterwards that the instrument is ambiguous. The present case resembles *Wood v. Mytton*, *except that the note here is joint and several. In each case the instrument, not a promissory note originally, became so by endorsement. [EKELE, J. The decision there seems to have proceeded on the clause of the statute of Anne, which enables an endorsee to sue the endorser.] Whenever the endorsement is made, the party or parties have ordered, and the body of the note, coupled with the endorsement, cannot be ambiguous. [WIGHTMAN, J. It would seem as if the endorsement here was the act of the whole five.]

Cur. adv. vult.

Lord DENMAN, C. J., on a later day of the term (November 15th), delivered the judgment of the court.

This was an action on a promissory note, appearing to be made by the defendant and four other persons, and payable "to our and each of our order:" and the question (besides one on which no decision is necessary) was, whether a note so framed was a good promissory note under the statute, or was void by reason of its uncertainty. We are of opinion that there is no ground for the objection, since the jury have found that the defendant endorsed. The instrument is thereby made certain: and there is no ground for arresting the judgment. Rule discharged.

(a) See *Heper v. Williams*, 2 Exch. 22, 21.

*SIMPSON v. MARGITSON and Others. Nov. 8. [*28]

An auctioneer was employed to sell land, under a written contract, that he should be paid one per cent. commission, but, if the estate were not sold within two months after the day of auction, only one half per cent.

Held that this, by itself, meant "two lunar months," unless there was admissible evidence that the parties meant "calendar months."

That the Judge might construe it to mean calendar months, if the context showed this meaning. Or if this appeared to him, from the surrounding circumstances, at the time of making the contract.

That, if there were evidence that the words were used in a sense peculiar to the trade, business, or place, the jury upon this might find such peculiar meaning.

And that a jury may, in some instances, find the meaning of technical words.

But that, here, the conduct or correspondence of the parties since the making of the contract was not evidence upon which, alone, a jury might find that the words denoted calendar months.

ASSUMPSIT for work and labour. Plea, except as to 225*l.* 5*s.*, Non assumpsit: and payment into Court of 225*l.* 5*s.* The particulars claimed 425*l.* 10*s.*, being 25*l.* for the expense of a survey, and 410*l.* 10*s.* for commission on the sale of an estate.

On the trial, before WIGHTMAN, J., at the London sittings after Trinity term, 1846, it appeared that the defendants had employed the plaintiff, an auctioneer, to sell an estate, called the North Cove estate, by auction. The terms of his employment were the subject of a correspondence: but it was agreed that the contract was as proposed by the defendants in a letter to the plaintiff, dated 1st May, 1845, which contained the following words: "The terms upon which the sale of the North Cove estate is offered to you are one per cent. upon the purchase-money; that to include every expense, and to be paid if sold by auction or within two months after; half per cent. if not sold at auction, or within two months after upon a reserve price." The estate was put up for auction on 6th August, 1845; but was then bought in. Afterwards, on 2d October, 1845, the estate was sold by private contract for 40,050*l.* The counsel for the defendants objected that, as the sale, *24] though within two calendar months from the day of auction, *was not within two lunar months, only half per cent. commission, 200*l.* 5*s.*, besides the expense of the survey, was due. The plaintiff's counsel tendered the evidence of some auctioneers, to show that, among land auctioneers, "month" was understood to mean "calendar month:" but this evidence, upon being objected to, was withdrawn. The plaintiff's counsel then contended that it appeared from evidence produced with reference to another part of the case (namely, a correspondence which had taken place between the parties after the sale, and the contents of a bill of particulars which the defendants had approved of after the contract of commission and before the day of auction) that the parties understood "calendar months" to be meant. The counsel for the defendants contended that the written contract must be construed by the Judge; that the meaning of the word "month" was "lunar month;" and that this could not be altered by the evidence given. The learned Judge left to the jury to say which meaning the parties had; and they found that calendar months were meant. His Lordship then directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendants. In Michaelmas term, 1846, *Watson* obtained a rule nisi to enter a verdict for the defendants, or a nonsuit.

Byles, Serjt., and *Unthank* now showed cause.(a). First, the meaning of the word "month," in this particular contract, is a question of fact and was rightly left to the jury; and the evidence which was actually *25] given, after the withdrawing of proof as to the *customary acceptation of the word in the trade, was legitimately taken into consideration, as showing the meaning of the parties. The motion is no

(a) Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

made on the ground that the verdict is against the weight of evidence. *Smith v. Wilson*, 3 B. & Ad. 728, is a leading case on this point: there evidence was received that, by the custom of a country in which a lease was made with a provision as to ten thousand rabbits, a thousand rabbits meant twelve hundred. So in *Hutchinson v. Bowker*, 5 M. & W. 585, it was held that evidence was rightly received as to the meaning in the trade of the words "good barley" and "fine barley," occurring in a written contract. *Clayton v. Gregson*, 5 A. & E. 302, is to the same effect. In *Jolly v. Young*, 1 Esp. N. P. C. 186,(a) it was left to the jury, even without evidence, whether "month" in a charter-party meant calendar or lunar month; and they found that it meant calendar month. "Acre" and "perch" may be shown to mean one quantity of land in one county and another quantity in another county; per *Curiam* in *Barksdale v. Morgan*, 4 Mod. 185, 186. In *Bourne v. Gatcliffe*, 3 M. & G. 643, 689,(b) it was held that a written contract might be explained by the conduct of the parties in previous transactions. The ambiguity here is no more patent than in *Smith v. Wilson*; this falls within the class of cases in which evidence is admissible according to *Altham's Case*, 8 Rep. 150 b, 155 a. [COLERIDGE, J. A latent ambiguity is raised by evidence: what is the evidence to raise it here?] The Court knows that "month" is used in two senses. [COLERIDGE, J. *26 Then you make the ambiguity patent.]

Secondly, supposing the question to be purely of law, "month" here means calendar month. Where land was let for six months from, &c., and so on from six months to six months, until one of the parties should give six calendar months' notice in writing, this court construed the "months" to mean calendar months in the first two instances as well as the last: *Regina v. Chawton*, 1 Q. B. 247. The court certainly there relied on the context; but *LITTLEDALE, J.*, said: "It is suggested that the months must be lunar. That is so generally, except in the case of mercantile instruments, where the months are understood to be calendar months." In *Webb v. Fairman*, 3 M. & W. 478, an objection that "months," in a written contract for a sale of goods, meant lunar months, was held to have been taken too late: but *PARKE, B.*, seems to have considered the objection invalid in itself. *Jocelyn v. Hawkins*, 1 Str. 446, appears to be a ruling the other way, as to contracts for stock: but that may have been a contract by deed: if this case cannot be so explained, it is contradicted by the later one of *Titus v. The Lady Preston*, 1 Str. 652, and is inconsistent with the language of the Court of Common Pleas in *Cockell v. Gray*, 3 Br. and B. 186. [COLERIDGE, J. I do not see why you call this a mercantile contract.] The rule of reckoning by calendar months, was applied to a sale of lands by auction,

(a) Before a special jury at Guildhall.

(b) In Exch. Ch. Affirmed in Dom. Proc., *Bourne v. Gatcliffe*, 7 M. & G. 850, 865; 11 Cl. & F. 45, 69, 70; S. C., not S. P., *Gatcliffe v. Bourne*, 4 New Ca. 314, in C. P.

in *Hipwell v. Knight*, 1 Young & C. Exch. 401, 419, by ALDERSON, B. Here the question is as to a contract for the sale. In 1 Sugd. V. & P. 283 (11th ed.), Ch. V. sect. 1, it is said that in sales of land by *private agreement "it is usual to fix a time for completing the
 *27] contract. In such a contract the word *month* may be construed either lunar or calendar, according to the intention of the parties, to be collected from the whole instrument taken together." It is not there suggested that *primâ facie* either one or the other construction is the right one. Here too the contract is made in terms framed by the defendants themselves; and *verba fortius accipiuntur contra proferentem*; Bacon's Maxims, Reg. 3; a maxim peculiarly applicable to a question upon ambiguity of words. It has not been decided, as a point of pure law, that "month" must mean "lunar month," except where the word is used in the course of phraseology essentially legal, as in the judgments or rules of the Courts, or in Acts of Parliament. Instances are collected in Com. Dig. Ann. (B), Co. Lit. 135 b. Yet, even in the case of a statute, this rule is not universal, but is qualified *secundum subjectam materiam*. Thus *tempus semestre*, in stat. West. 2 (1 stat. 13 Ed. 1), c. 5, the six months by which a lapse is incurred, is construed to mean half a year; *The Bishop of Peterborough v. Catesby*, Cro. Jac. 166:(a) and the month within which inquiry may be of a writ, under stat. 13 H. 4, c. 7, s. 1, is a calendar month; *Rex v. Cussens*, 1 Sid. 186. In the cases of bills of exchange, hiring of servants, and notices to quit (unless where there is a weekly reservation of rent), the word is construed to mean "calendar month." *Barksdale v. Morgan*, 4 Mod. 185, *Tullet v. Linfield*, 3 Bur. 1455, *In the Matter of Swinford*, 6 M. & S. 226, were cases where the phraseology was necessarily legal and
 *28] technical. In Sir *Wollaston Dixie's case, 1 Leon. 95, the Court seem to have doubted which construction was to be adopted on a question of usury: but it was said that in a policy of insurance the lunar month would be understood; the reason of which must have been that at that time a month, in common parlance, ordinarily had that sense; whereas now the other sense is commonly used. An instance of the mode in which the strict technical language is controlled by ordinary usage is suggested by stat. 21 H. 3 (mentioned in Co. Lit. 135 b), according to which the 28th and 29th of February in a leap year are to be accounted as only one day; yet no contract relating to a specific number of days including the 29th of February would be so construed now. So a quarter of a year varies in length according to the time at which it occurs; Anonymous (b) case in *Dyer*: and the half year's notice from Michaelmas to Lady Day is shorter than that from Lady Day to Michaelmas, the computation being neither by days, calendar months, lunar months, nor even fixed aliquot parts of a year. So the words

(a) In error from C. B. See the case in C. B., *Catesby's Case*, 6 Rep. 6' b. See also 2 Inst. 261.

(b) 3 *Dyer*, 345 a.

"equally to be divided" make a joint tenancy in a deed, where the strict legal construction is applied, but a tenancy in common in a will, where language is construed according to ordinary usage, and in a limitation under the statute of uses, the use there being a substitute for a trust, which would be expounded according to ordinary usage; *Fisher v. Wigg*, 1 P. Wms. 14. In *Mallan v. May*, 18 M. & W. 510, the court refused to construe the word *London*, in a deed, otherwise than as the city of London, that being the strict and primary acceptation of the word: but *month* cannot be said to have any strict and primary acceptation.

* *Watson*, contra. The general rule is that "month" means "lunar month," except where the context shows that "calendar month" is meant. To this rule there are some exceptions, as in ecclesiastical matters, and in cases where mercantile custom has fixed the meaning. That is conformable to the judgment of *LE BLANC, J.*, in *Lang v. Gale*, 1 M. & S. 111, 117, where the rule is not confined to legal documents; and the judgments of *LITLEDALE, J.*, and *PATTERSON, J.*, in *Regina v. Chawton*, 1 Q. B. 250, 251. Under the head *Dr. Cles, et son chapelain*, *Litt. R.* 19, in *Littleton's Reports*, it is said to have been ruled that the six months within which the suggestion for prohibition must be proved, under stat. 2 & 3 Ed. 6, c. 18, s. 14, are half a year: that is an ecclesiastical matter: and this is also an explanation of *The Bishop of Peterborough v. Catesby*, Cro. Jac. 166. If the decision in *Titus v. The Lady Preston*, 1 Str. 652, was that "months," unexplained, are calendar months, the decision cannot be upheld. The rule is correctly laid down in the passage cited from *Sugden*: but here the context furnishes nothing to show the intention of the parties to use the word otherwise than according to the general rule. In *Hipwell v. Knight*, 1 Y. & Coll. Exch. 401, 419, the decision was on another point; and there is only a short remark of *ALDERSON, B.*, in which he disclaims proceeding on the point now in question. No evidence can be admitted here, because the ambiguity, if there be one, is patent. The attempt, therefore, is to explain a written document by extrinsic evidence. [*COLLIERIDGE, J.* In *Den dem. Peters v. Hopkinson*, 8 Dowl. & R. 507, oral evidence was admitted to show that by "Lady Day," in a lease, the parties meant "Old Lady Day," the lease not being by deed.] The distinction cannot be between instruments under seal and instruments not under seal: in *Smith v. Wilson*, 8 B. & Ad. 728, the instrument was a deed. In *Goldshede v. Swan*, 1 Exch. 154, where a written guarantee, dated 22d June, stated the consideration to be the plaintiff's "having this day advanced," and the declaration on the guarantee stated the consideration to be that plaintiff would advance on 22d June, the Court held that evidence was admissible to show that the advance was not made before the guarantee was given, the language of the guarantee being ambiguous; though they said that no evidence could be received to alter or vary the effect of the instrument.

Byles, Serjt., at the close of the argument, mentioned *Brooks v. Haigh*, 10 A. & E. 323,^(a) and *Dyke v. Sweeting*, Willes, 585; and *Watson* referred to *Neilson v. Harford*, 8 M. & W. 806, 823. *Cur. adv. vult.*

Lord DENMAN, C. J., on a later day in this term (November 25th), delivered the judgment of the Court.

The plaintiff, an auctioneer, claimed commission upon the sale of an estate, under a contract for the payment thereof if the sale should be within two months after an auction. The sale was not within two lunar months, but was within two calendar months, after the auction. A letter from the plaintiff, claiming the commission, *and an answer of *81] the defendant apparently admitting his liability, were in evidence. The plaintiff proposed to call witnesses to prove that, according to the usage in the business of auctioneers, "months" signified "calendar months," but, on objection, withdrew the evidence. The learned Judge directed the jury to find for the plaintiff if, in their judgment, on this evidence, the parties to the contract intended by "months" "calendar months;" and the verdict was for the plaintiff.^(b)

The defendant obtained a rule to enter a nonsuit, according to leave reserved, or for a new trial;^(c) and has contended that "month" in temporal matters means "lunar month," unless, either from the context or from the usage in a trade, business or place, it is made to appear that the parties intended another meaning; that there was no such evidence here; that other extrinsic evidence was inadmissible; and that it was, therefore, the duty of the Judge to have construed the contract and decided against the plaintiff.

The plaintiff has adduced various decisions to support the verdict; but we are of opinion that he has not succeeded. It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the Judge. It is also clear that "months" denote at law "lunar months," unless there is admissible evidence of an intention in the parties using the word to denote "calendar months."

If the context shows that calendar months were intended, the Judge *82] may adopt that construction: *Lang v. Gale*, 1 M. & S. 111, *Regina v. Chawton*, 1 Q. B. 247. If the surrounding circumstances, at the time the instrument was made, show that the parties intended to use the word, not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances, according to the intention of the parties: *Goldshede v. Swan*, 1 Exch. 154, *Walker v. Hunter*, 2 C. B. 824, *Bacon's Maxims*, Reg. 10, and the examples there given, *Mallan v. May*, 13 M. & W. 510, *Beckford v. Crutwell*, 1 Moo. & R. 187. If there is evidence that the word was used in a sense peculiar to a trade, business or place, the jury must say whether the

(a) In Exch. Ch., affirming the judgment of Q. B. in *Haigh v. Brooks*, 10 A. & E. 309.

(b) See p. 24, ante.

(c) The rule nisi, as drawn up, was to enter a verdict for defendants, or for a nonsuit.

parties used it in that peculiar sense; *Smith v. Wilson*, 3 B. & Ad. 728, *Grant v. Maddox*, 15 M. & W. 737, *Jolly v. Young*, 1 Esp. N. P. C. 186. If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury; *Robertson v. Jackson*, 2 C. B. 412, *Bourne v. Gatliff*, 11 Cl. & F. 45. Also the jury may have to give the meaning of some technical words.

But the present case is not within either of the above principles; nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to withdraw the construction of a word therein, of a settled primary meaning, from the Judge, and to transfer it to the jury. Some cases were cited, where the word "month" has been stated by Judges to mean calendar and not lunar month, without express reference to the context or *circumstances; but those cases appear to be decided on some other point; and the [*33 dicta which are reported are observations collateral to the judgment; *Dyke v. Sweeting*, Willes, 585, *Hipwell v. Knight*, 1 Y. & C. Exch. 419, *Webb v. Fairmaner*, 3 M. & W. 473.

Although the evidence that was given does not appear to us sufficient to support the verdict, yet, as evidence was withdrawn which may be important, we think that the plaintiff should have an opportunity of again tendering it; and, therefore, make the rule absolute for a new trial.

Rule absolute for a new trial.

EDWARDS and Others, Assignees of YOUNG, a Bankrupt,
v. COOPER, Esquire. Nov. 5.

If execution be taken out in the name of two parties jointly interested, as co-plaintiffs, and one knows of an act of bankruptcy already committed by the defendant, his knowledge is *prima facie* the knowledge of both; and the execution is not protected by stat. 2 & 3 Vict. c. 29, s. 1: even though the execution be in fact sued out by one party only, of whose knowledge there is no evidence.

Per COLERIDGE, J. *Quære*, whether the knowledge of one co-plaintiff would not affect the other, even if it were proved that he in fact was ignorant of the prior act of bankruptcy.

Under stat. 6 G. 4, c. 16, s. 3 (and see stat. 12 & 13 Vict. c. 106, s. 67), a party procuring bills of exchange, his property, to be taken in execution with intent to defeat creditors, after the passing of stat. 1 & 2 Vict. c. 110, committed an act of bankruptcy, though, at the time when that act of G. 4 passed, bills of exchange were not liable to be taken in execution.

TROVER by plaintiffs, as assignees, for "bills of exchange, promissory notes, paper writings, and pieces of stamped paper." The declaration described specially several bills of exchange and promissory notes: and the first count laid the possession in Young, the bankrupt, and alleged a loss, and a finding by defendant, before the bankruptcy, and conversion by defendant *after the bankruptcy. The second count laid [*34 the possession in the plaintiffs as assignees.

Pleas. 1. Not guilty. 2. That plaintiffs were not assignees, &c., in

manner and form, &c. 3. To the first count: That Young was not lawfully possessed, &c. 4. To the same: That plaintiffs were not, at the time of the supposed grievances, &c., lawfully possessed, &c., as such assignees, &c. 5. To the last count: That plaintiffs were not lawfully possessed, &c., as such assignees, &c. Conclusions to the country; and issues thereon.

On the trial, before PARKE, B., at the last Maidstone assizes, it appeared that the plaintiffs were assignees under a fiat issued, Jan. 30th, 1847, on an act of bankruptcy unconnected with the transactions after mentioned. On the 15th of that month, the stock in trade of Young, the bankrupt, had been taken under a *fi. fa.* at the suit of Charles Lepine, for a debt alleged to be due from the bankrupt to Lepine individually; and on the 17th the bills of exchange and other documents claimed in the present declaration were taken under a *fi. fa.* at the joint suit of Lepine and Benjamin Mutton, and, not being yet due, were held by the sheriff, the now defendant, under stat. 1 & 2 Vict. c. 110, s. 12. Lepine and Mutton were trustees under a marriage settlement, by which Young had covenanted to pay them 1000*l.*: and for that sum, which had not been paid, the last-mentioned execution was sued out. This proceeding, though in their joint names, was in fact instituted by Mutton alone. The case for the plaintiffs was: first, that the execution of January 15th was collusive; on which point evidence was given: that Young had, on that occasion, committed an act of bankruptcy under stat. 6 G. *85] 4, c. 16, s. 8, by procuring "his goods, money *or chattels, to be" "taken in execution," "with intent to defeat or delay his creditors:" (a) that, inasmuch as Lepine knew of such act of bankruptcy, Mutton, who sued out the second execution jointly with Lepine, and as his co-trustee, must be taken to have known of it also, and therefore the second execution was not protected by stat. 2 & 3 Vict. c. 29, s. 1, as executed *bonâ fide* and without notice of a prior act of bankruptcy: or, secondly, that the latter execution was itself, on the part of Young, a causing and procuring the property to be taken in execution for the purpose of defeating his creditors by a fraudulent preference. (b)

PARKE, B., left both heads of the case to the jury. With reference to the first, he stated that an act of bankruptcy was committed by Young's procurement of the first execution, if the jury were satisfied that, in order to defeat Young's other creditors, that process was obtained for a debt which did not really exist, or for a real debt but with intent to give a fraudulent preference. If they were so satisfied, his Lordship thought that, to bring the execution of January 17th within stat. 2 & 3 Vict. c. 29, it must appear that neither Lepine nor Mutton had notice of the prior act of bankruptcy; and it was for the defendant to give some reasonable evidence of that negative. As to the plaintiff's second

(a) The same words are repeated in stat. 12 & 13 Vict. c. 106, s. 67.

(b) The plaintiff's counsel, in opening the case, cited *Hall v. Willance*, 7 M. & W. 282.

position, he left it to the jury to say, on the evidence, whether the execution of January 17th was procured by Young for the purpose of defeating his creditors by giving a fraudulent preference to the trustees under the settlement. The jury found a verdict for the plaintiffs to *the whole amount claimed, subject to reduction if the bills, &c., [*86 should be given up.

Chambers now moved for a new trial (a) on the ground of misdirection, and that the verdict was against the evidence; and also on the ground, taken at the trial but without success, that stat. 6 G. 4, c. 16, s. 3, did not apply to the procuring bills of exchange or notes to be taken in execution. First: the suit in which Mutton and Lepine had execution was really prosecuted by Mutton alone; and no proof was given of any actual knowledge by him that a former execution had issued. Lepine knew it; but there is no authority for saying that knowledge by one of several co-trustees joined in an action is knowledge by all. [COLERIDGE, J. Lepine appeared as a co-plaintiff. *Primâ facie* he knew what the other plaintiff knew. What evidence was there to the contrary?] The facts showed that Mutton acted independently as to the execution. Absence of knowledge on his part was proved, as far as the nature of such a case made the proof attainable. But it was incorrect to say that the burden of disproving knowledge lay upon the execution creditor. [Lord DENMAN, C. J. Lepine, who was one of the two execution creditors, is admitted to have known of the prior act of bankruptcy.] He was not cognisant of the second execution. [WIGHTMAN, J. For legal purposes he was as much a plaintiff as Mutton. He might have released.] The suggestion that Mutton's execution was itself a procurement by the bankrupt, in fraud of creditors, was not borne out by any evidence. Lastly, under any *circumstances, procuring bills and notes to be taken in [*87 execution would not have been an act of bankruptcy. When stat. 6 G. 4, c. 16, passed, bills and notes could not be seized in execution: therefore a seizure of such property was not contemplated by sect. 8. Stat. 1 & 2 Vict. c. 110, s. 12, subjects bills and notes to seizure under a *fi. fa.*; but that cannot extend the operation of a former statute creating and defining an act of bankruptcy. [COLERIDGE, J. You say that the effect of stat. 6 G. 4, c. 16, depends upon what things the sheriff seizes. WIGHTMAN, J. In *Cumming v. Baily*, 6 Bing. 868, a bill of exchange was considered to be a chattel within sect. 3.] That was with reference to "gift, delivery, or transfer," of which bills might have been the subject when the act passed. In *Sims v. Thomas*, 12 A. & E. 536, a bond, which had been assigned, was held not to fall within the description of "goods and chattels" the assignment of which was void under stat. 18 Eliz. c. 5, s. 2; and this Court said in its judgment: "It is only such things as may be taken in execution that are affected by the statute of Elizabeth. Bonds, indeed, are now liable to be taken in exe-

(a) Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

cution ; (a) but they were not so at the time of the making the indenture of assignment."

LORD DENMAN, C. J. On the point first mentioned, I have no doubt that notice to the one co-plaintiff was presumably notice to both ; and it lay upon any one who was affected by the consequence of that presumption to prove that the second co-plaintiff had not notice. On the question whether stat. 6 G. 4, c. 16, s. 3, applies to bills, I should have had *38] no doubt but for the case *of *Sims v. Thomas*, 12 A. & E. 536 ; and there the reasoning turned upon a construction of the words "goods and chattels" deduced from the apparent intention of the statute of Elizabeth ; referring to that, the Court held that the bond in question did not come within the description of "goods and chattels" in that act. But bills of exchange were always chattels, though not liable to be taken in execution till after stat. 1 & 2 Vict. c. 110. Still, it may be a question whether they are among the things which, under the enactment of stat. 6 G. 4, c. 16, s. 3, if a man "procure" to be "taken in execution" he commits an act of bankruptcy. On this point, and on the effect of the evidence, we will take time to consider.

COLERIDGE, J. I should be inclined to say, though I desire not to be concluded on the point, that even actual ignorance of an act of bankruptcy on the part of one co-plaintiff would not prevent notice to the other from taking effect as notice to both.

On the evidence, and the application of stat. 6 G. 4, c. 16, s. 3, to bills,

Cur. adv. vult.

On a subsequent day of the term (November 18th), LORD DENMAN, C. J., said that the rule was

Refused.

(a) Stat. 1 & 2 Vict. c. 110, s. 12.



*39] *CHRISTOPHER ROWLANDS v. SAMUEL. Nov. 6.

Seem that, if one of two parties indicted, having a defence common to both, retains an attorney to defend them, and pays him the whole costs of defence, and they are acquitted, such party, in an action for malicious prosecution, may demand the costs so paid as part of his damages. Held that, at all events, he may so recover if, the costs of defence being divisible, it has been expressly left to the jury to deduct any part of such costs which they thought not fairly incurred by the plaintiff, and they have found for him as to the whole.

CASE. The declaration charged that defendant maliciously and without probable cause indicted plaintiff, together with six other persons named in the count, for a conspiracy to give false evidence before an arbitrator in a cause referred to him, in which the now defendant was plaintiff and the now plaintiff defendant, and to prevent defendant, the then plaintiff, from recovering : the indictment was also stated to have charged a conspiracy to defraud the now defendant of his goods. The declaration alleged an acquittal of plaintiff, and damage sustained by

him; and, among other injuries, that plaintiff had been forced and obliged to lay out and expend and incur, and did lay out, expend, and incur, moneys and debts amounting to a large sum, to wit, &c., in and about the defending of himself in the premises. Plea: Not guilty. Issue thereon.

On the trial, before ERLE, J., at the sittings in Middlesex after last Trinity term, it appeared that the indictment at the Central Criminal Court was preferred by the now defendant against the plaintiff, his four sons, and two other persons. The clerk of the attorney who conducted the case at the Central Court for the seven defendants there was called, and proved that the bill of costs for the defence of all the parties had been sent in to the now plaintiff, and amounted to 442*l.* 10*s.* 8*d.*, of which 200*l.* had been paid; and that such payment had been made by the plaintiff. The learned Judge, in summing up, left it to the jury to say whether there was any fact in the case which authorized the now defendant to make the charges of conspiracy; and whether he *had acted maliciously: and his Lordship observed that, if the verdict [*40 was for the plaintiff, he would be entitled to recover the expense he had been put to, as well as damages for the annoyance he had undergone, and the injury to his feelings. Verdict for plaintiff, with 900*l.* damages, including 442*l.* 10*s.* 8*d.* for the costs.

Chambers now moved for a new trial, on the ground, among others, of misdirection as to the costs, contending that, on a criminal proceeding against several persons, one could not, by paying the costs of all, entitle himself individually to recover the whole amount in an action for malicious prosecution: and therefore the learned judge ought not to have told the jury, generally, that the plaintiff might recover the costs of the indictment.(a)

(a) Another point was taken, on which, however, the Court gave no decision requiring a detailed report. It appeared that Samuel had bought a quantity of watches of the now plaintiff, Christopher Rowlands. The watches were at a place in Leadenhall Street where C. Rowlands was then temporarily carrying on the business of a son lately deceased, who had been a watchmaker. Samuel obtained permission to leave the watches for a time on the premises, and (according to his own case) to take the chance of any of them being sold while they so remained. They were left there accordingly, in the possession of Christopher's son, Thomas Rowlands, whom Samuel, as he alleged, considered to be the agent for his father there. C. Rowlands denied the agency, and alleged that any subsequent transactions between his son and Samuel were confined to themselves, he, Christopher, having previously given up the premises. Thomas Rowlands absconded; and a number of the watches, as Samuel alleged, were not accounted for. Samuel brought an action against Christopher, the father, and now plaintiff, for the price: the cause was referred to arbitration; and the facts which gave rise to the indictment above mentioned took place on the reference. Samuel there gave evidence of an agreement by Christopher Rowlands, to be responsible for the watches. C. Rowlands examined witnesses to show that he had refused to be responsible after the next Monday, September 13th, 1841, when he was to give up the premises: and that, on the 13th, Samuel himself removed the watches from Leadenhall Street. The award was given in favour of C. Rowlands. Thereupon the indictment was preferred: and, after the acquittal, C. Rowlands brought the present action, and, on the trial, gave evidence as to the removal of the watches by Samuel on Monday, September 13th, and other alleged facts tending to exempt him from responsibility in the transactions with Samuel. To show the bona fides of C. Rowlands, it was sworn, among other things, that he had cautioned Samuel as to his dealings with Thomas the son, and warned him to keep Thomas's accounts regular, adding, "I do not com-

*41] *Lord DENMAN, C. J. As to the question of costs, if two per-
 *42] sons are indicted for a conspiracy, and one employs an attorney,
 he may properly charge the costs of *defending both, because each
 is interested in the acquittal of the other. It would be difficult
 to allege that the party had paid half the costs of a witness, or half a
 counsel's fee; or to point out which facts it was important to one party
 to prove, and which to another. And the attorney is entitled to say
 that he will have a good paymaster before he undertakes the defence at
 all, but that, if he has that, he will defend both parties. This is my
 opinion: but the point does not arise in the present case; for my brother
 ERLE says he left it to the jury to deduct any part of the costs which
 might appear to them not fairly incurred by the now plaintiff: though I
 question if a division of them could regularly have been made.

COLERIDGE, J. As to the damages, no injustice has been done. I

sider him one of the brightest of us." At the close of the plaintiff's case the defendant's counsel
 contended that there was no evidence of want of probable cause. ERLE, J., thought there was
 evidence for the jury: and the defendant's counsel then called witnesses to show that from the
 10th to the 15th of September, 1841, Samuel was at Brighton. The learned Judge left it to the
 jury to say: first, whether there was any fact which authorized Samuel to make the charges con-
 tained in the indictment; secondly, if there was not, whether Samuel, in preferring the indictment,
 had acted maliciously; which he explained to mean with corrupt motive, as, for instance, that
 of extorting money. On the first point he said: "If you think that Samuel was at Brighton on
 all Monday, you will give your verdict for the defendant." He then went over the other facts of
 the case as stated by the several witnesses, but did not state to them as a necessary conclusion
 with regard to any of these facts, that, if such fact or facts were proved, want of cause was
 negatived.

Chambers, on the present motion, contended that there was a misdirection in this respect; for
 that, according to *Panton v. Williams*, 2 Q. B. 169, the Judge ought to have put to the jury each
 distinct fact that might have amounted to reasonable and probable cause, and to have stated that,
 if they found such fact proved, the defendant was entitled to a verdict. He also urged that their
 attention was not sufficiently called to the possibility of Samuel having been in London during
 some part of Monday the 13th of September.

Lord DENMAN, C. J., said: I feel that a great difficulty is raised by the case of *Panton v. Wil-*
liams, 2 Q. B. 169, which is against several other decisions. I regret that it was not brought
 before the House of Lords. That case, however, does not lay down, as a rule, that the judge is
 to submit each particular fact to the jury, but only that he is to look at all together, ask the jury
 which is proved, and decide according to the result, whether probable cause is shown or not. As
 to single facts, what law can he resort to in directing the jury? How can he lay down, as a gen-
 eral proposition of law, what particular fact shows probable cause under the circumstances of an
 individual case? The fact which is probable cause in one case is not in another. What general
 rule can there be? There is, on any view, a difficulty; but, the Court of Exchequer Chamber
 having decided as they did, I have always endeavoured to follow their ruling. His Lordship
 then went through the facts adverted to on the present motion, and said, as to those on which
 no specific direction had been given to the jury, that they did not, in his opinion, either sepa-
 rately or together, show probable cause: and he observed, as to the question of Samuel's pre-
 sence at Brighton: "I think my brother ERLE put that in the manner required by the judgment
 in *Panton v. Williams*, 2 Q. B. 169; not desiring them to find a special verdict, but saying, 'if
 you find one way on the evidence, there is reasonable cause; if you find otherwise, there is not.
 If the question put to them was, whether he was at Brighton the whole of the 13th, that must
 be taken in a qualified sense. Proof of absence the whole day would be proof of absence at any
 particular time that could be relied upon, and would therefore apply to the material point in the
 case. Proof of absence for a less time might also apply. And, if the judge was wrong on this
 point, it would not be a misdirection in law, but a misconception of fact."

COLERIDGE, J., also was of opinion, that the facts adverted to by *Chambers* as imperfectly left
 to the jury did not amount to probable cause.

See *Turner v. Ambler*, 10 Q. B. 252.

should prefer not laying down a general *rule, but should say that a question such as that now raised must depend upon the facts of the particular case. Under the circumstances supposed by my Lord, each party would certainly have an interest in acquitting the other. But where each has a distinct defence, as for instance if one alone proves an alibi, the case may be different. There, however, the costs would be easily severable, and the jury would be bound to consider how they ought to be borne.

WIGHTMAN and ERLE, Js., concurred.

Rule refused.

WHITE v. HUMPHERY. Nov. 8.

Defendant, a carrier and wharfinger, received into his warehouse certain goods of the plaintiff, on the terms that they should be conveyed by defendant's barges to London when the plaintiff should direct, at the usual freight, and that, in the mean time, they should be kept by defendant without charge for warehousing. Held, in an action for not keeping the goods safely, that defendant was not a gratuitous bailee.

ASSUMPSIT. The declaration stated that, in consideration that plaintiff at defendant's request had caused to be delivered to defendant a large quantity of hops to be taken care of and securely kept by defendant for reasonable reward, &c., defendant promised to take care of and securely keep the said hops. Breach: that, although defendant received the hops on the terms aforesaid, they were damaged by his negligence.

Pleas. 1. Non assumpsit. 2. A traverse of the alleged negligence. Issues thereon.

On the trial, before PARKE, B., at the last Maidstone assizes, it appeared that, in 1844, the plaintiff had deposited between three and four tons of hops at a warehouse at Maidstone, belonging to the defendant, who *carried on the business of a wharfinger and carrier there, on the terms that they should be conveyed by his, defendant's, barges to London, when the plaintiff should direct, at the usual freight, and that, in the mean time, they should be kept by the defendant without charge for warehousing. The hops remained in the warehouse for about thirteen months; and then, upon the plaintiff's order, the defendant conveyed them to London. On their arrival, it was discovered that they had been damaged by mice while in defendant's custody. For the defendant it was contended that he did not appear, upon the evidence, to have been guilty of gross negligence, and consequently that he was not liable, being only a gratuitous bailee. The learned Judge, as to this last point, directed the jury that the advantage of carrying the hops for hire might be considered as payment for the warehousing, and that the defendant was not a gratuitous bailee.

Verdict for plaintiff.

Chambers now moved (a) for a new trial on the ground of misdirection. The allegation in the declaration, that the hops were warehoused

(a) Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and ERLE, Js.

for reward, was not proved. The remuneration to be paid to the defendant as carrier was a distinct matter. In *Garside v. The Proprietors of the Trent Navigation*, 4 T. R. 581, (a) the defendants, who were common carriers, received hops to be carried from Stourport to Manchester, and to be forwarded by another carrier to Stockport. The goods arrived safely at Manchester, and were then put in the warehouse of the defendants, where, by the course of business, they were to be kept without reward till forwarded. They were consumed in the warehouse by an accidental fire, before any carrier came from Stockport to whom they could be delivered. It was held that the defendants were not responsible: and Lord KENYON observed in his judgment: "If the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds: he is held responsible as an insurer." "But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches."

Chambers moved also on the ground that the verdict was against evidence. [Lord DENMAN, C. J. We will see the learned Judge.]

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of the term (November 25th), delivered the judgment of the Court.

In this case a motion was made for a new trial for misdirection, on the ground that the defendant was shown to be a gratuitous bailee and not a bailee for hire. The defendant had kept hops for the plaintiff in a warehouse for thirteen months. He had been for some time a carrier, and for the thirteen months had also had the warehouses, which before had belonged to another; and he had not yet made any charge for warehousing. The learned Judge held that, even if he received the hops into his warehouse for the purpose of being carried for hire afterwards, he was not a gratuitous bailee: and we are of the same opinion.

*A new trial was also moved for on the ground that the verdict *4C] was against the evidence: but there appears no ground for this motion.

Rule refused. (b)

(a) See *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 389.

(b) Reported by H. Davison, Esq.

PLUMER v. BRISCO. Nov 9

In an action against the sheriff for taking insufficient sureties to a replevin bond, under stat. 11 G. 2, c. 19, s. 23: Held, on motion for a new trial, after verdict for plaintiff,

1. That the execution of the bond was sufficiently proved without calling any attesting witness, the assignment being in evidence.
2. That the declarations and acts of the replevin clerk at the time of his taking the bond were evidence against the sheriff, though there was no proof, except from those declarations and acts, that the person was replevin clerk at the time.

3. That s. d. fa., executed in an action for use and occupation brought by the now plaintiff against the plaintiff in replevin, to recover the rent which had been distrained for, was evidence in an action against the sheriff, to show that, such execution having been unproductive, the plaintiff had failed to obtain satisfaction of the rent after the taking of the bond; though the plaintiff in replevin was so party to the present action.
4. That no objection arose from the plaintiff in replevin having omitted to levy his plaint till the next county court but two after he had replevied, though the declaration averred that he had levied his plaint, "to wit, at the then next county-court," and issue was taken on the averment.
5. That the plaintiff, having brought actions against the sureties (without notice to the sheriff), which actions had proved unproductive, might recover the costs from the sheriff, their amount not exceeding, with the other damages proved, the penalty of the bond.
6. The Judge having left it to the jury to say whether the defendant had used due care and exercised reasonable discretion in inquiring into the sufficiency of the sureties: That the question was for them, and was properly left.
- 7 and 8. On motion in arrest of judgment. That the declaration was good, though it alleged only that the sureties were insufficient, making no such averment as to the plaintiff in replevin, who also was party to the bond.
- And though it did not allege want of reasonable care on the part of the defendant, but merely stated as breach the insufficiency of the sureties.

CASE. The declaration stated that plaintiff distrained goods of William Martin Gladman for 110*l.*, arrears of rent due from Gladman to plaintiff for use and occupation of certain premises in Sussex: that defendant, being sheriff, to wit, on, &c. (July 4th, 1848), caused the goods to be replevied on Gladman's complaint: that "afterwards, to wit, at the then next county-court of the said sheriff, holden," &c., at, &c., "on the 12th day of October, A. D. 1848," Gladman appeared and levied his plaint, and then found pledges as well for *prosecuting [*47 to wit, Edward Constable and Michael Denman; that the plaint was removed, and Gladman declared in replevin, and the now plaintiff avowed, and prayed a return; that Gladman pleaded in bar, and issues to the country were joined, and tried, and a verdict returned for the now plaintiff, and the arrears of rent found to be 110*l.*; and it was adjudged, &c., that Gladman should take nothing, &c., but that he and his pledges to prosecute should be in mercy, &c., and that the now plaintiff should recover against him the said 110*l.*, being the arrears, &c., and 11*l.* 5*s.* for his costs, &c., as by the record, &c. Averment, that Gladman did not prosecute his said action with effect against the now plaintiff; and, although it was the duty of the now defendant as sheriff, before his making deliverance, &c., in pursuance of the statute, &c., to take from Gladman and two responsible persons as sureties a bond in double the value of the goods, &c., conditioned for prosecuting the replevin suit with effect and without delay, and for duly returning, &c., yet defendant, not regarding, &c., did not, nor would, before his making deliverance, &c., take from the said W. M. Gladman and two, &c. (as above), such a bond as aforesaid, conditioned as aforesaid, but wrongfully, &c., omitted and neglected so to do, and, on the contrary, wrongfully, &c., before the replevying and making deliverance, &c., to wit, on, &c., did take, in the name of the now defendant as such sheriff, &c., of the said W. M. G. and two other persons, to wit, one E. Constable and one M. Denman, a

certain bond conditioned, &c. (as above), as and for a bond taken in pursuance of the said statute: "nevertheless the plaintiff saith that the said E. C. and M. D., so taken *as sureties as aforesaid, were not, *48] at the time of the taking of the said bond, responsible sureties for prosecuting," &c., "or for duly returning," &c.; "but the said E. C. and M. D., at the time of their becoming such sureties as aforesaid, and of the now defendant taking the said bond as aforesaid, were, and each of them was, and ever since have been, and still are, wholly insufficient for that purpose:" Averment, that the goods have not been returned to plaintiff, nor the arrears of rent paid, nor the judgment satisfied, nor has Gladman answered the now plaintiff for the value of the goods. By means of which premises the now plaintiff hath been and is deprived of the said goods, &c., "and of the benefit of the said distress, and of the means of satisfying the said arrears of rent and the said costs and charges by him in and about his defence to the said suit in that behalf expended and in and about the endeavouring to obtain a return," &c.

The defendant pleaded Not guilty: Also, that Gladman "did not appear at the said county-court of the said sheriff," in manner and form, &c.; that no such bond as in the declaration mentioned was ever taken by the defendant, in manner and form, &c.; and other pleas, which need not be specified, traversing the material facts alleged in the declaration. On all these pleas (except one of nul tiel record) issues to the country were joined. The 12th plea averred that the sureties were, at the time of taking the bond, responsible sureties, &c.; which the plaintiff traversed: and issue was joined thereon. The 13th plea averred that, before the taking of the bond, to wit, on, &c., "defendant made due and proper inquiries, and in all respects according to, and in pursuance *49] of, his duty as such sheriff as aforesaid, in and about the solvency *and responsibility of the said E. C. and the said M. D.; and exercised due care and caution and a reasonable and proper discretion in and about taking the said sureties and the said bond and in and about the premises:" verification. Replication, that defendant did not exercise due care or caution, or a reasonable or proper discretion, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before COLTMAN, J., at the last Summer assizes for Sussex, the replevin bond (penalty 250*l.*) was produced on the part of the plaintiff; but the attesting witness was not called. It was, however, admitted that the defendant had assigned the bond. COLTMAN, J., held that it might be read. It appeared that the bond was taken by one Coppard, who acted on the occasion as replevin clerk; but no other proof was given of his holding that office: and therefore the defendant's counsel insisted that evidence of his words and conduct when taking the replevin bond could not be received. The learned Judge overruled the objection. To show that the plaintiff had been unable to recover the rent mentioned in the declaration, his counsel put in a writ of *fi. fa.*,

which had proved unproductive, in an action of assumpsit for use and occupation brought by the now plaintiff against the tenant Gladman. The evidence was objected to as irrelevant to a cause between Plumer and Brisco; but was admitted. Another objection taken by the defendant's counsel was that, whereas the declaration alleged the plaint to have been levied (as it ought to have been) at the next county court after the replevying of the goods, on which averment there was an issue, it appeared in evidence that the plaint was really not levied till the next county court but two; and therefore the plaintiff's issue on this point was not supported. The learned Judge held the averment as to the particular court immaterial. The plaintiff claimed to recover in the present action part of the costs of actions which he had brought against the sureties, but in which, though he succeeded, no sufficient amount could be levied: but it was argued that he could not recover these, not having given the sheriff notice of his intention to proceed against the sureties. COLTMAN, J., decided this point also in the plaintiff's favour. And, in summing up, he left it to the jury to say whether the defendant had used due care and exercised a reasonable discretion in inquiring into the sufficiency of the sureties. The jury found a verdict for the plaintiff; damages (including the costs of actions against the sureties) 246*l.* 5*s.*

Bovill now moved for a new trial. (a) 1. The attesting witness to the bond ought to have been called. *Barnes v. Lucas*, Ry. & M. 264, was cited as showing that the assignment made the bond admissible, as against the sheriff, without such proof. But the objection is supported by the general principles of evidence, and by the opinion of TINDAL, C. J., at nisi prius, which has not been overruled in Banc, in *The Fishmongers' Company v. Robertson*, 1 C. B. 60. (b) *Slatterie v. Pooley*, 6 M. & W. 664, which may be relied upon on the other side, was brought to the notice of the Court in the last cited case. 2. It is true that the mere acting as a public officer has been held evidence *that the party was so. [*51 But it would be carrying the doctrine very far to say that, where the question is whether particular acts were or were not done by a person exercising a certain office, those very acts, without any collateral proof, should be evidence of his holding the office. *Rex v. Jones*, 2 Camp. 131, was cited at the trial, but is not sufficient authority for the proposition. [WIGHTMAN, J. Here the defendant adopted the act of Coppard by assigning the bond.] It was not shown that the bond came to the defendant from Coppard. 3. The *fi. fa.* was inadmissible, because not relevant to the replevin suit here in question. It was in an action on promises, between Plumer and Gladman, to which the now defendant was a stranger. 4. The declaration alleges that Gladman appeared at "the

(a) Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

(b) Counsel stated that this case was depending in error, on a bill of exceptions. See *The Fishmongers' Company v. Robertson*, 3 C. B. 970.

next county court" after the replevin: an issue is taken on that averment; and it appears in evidence that Gladman did not appear till the fourth county court. The words "at the then next, &c.," are laid under a *videlicet*; but it was essential to prove that the appearance was as alleged. If the plaintiff meant that Gladman appeared at a court held within a reasonable time (supposing the fourth court to have been so), the court should have been worded accordingly. [ERLE, J. The levying of the plaint was Gladman's act, not the plaintiff's. WIGHTMAN, J. The time of levying it could not affect the obligee of the replevin bond. COLERIDGE, J. It was enough for the plaintiff to show such proceedings that, if good sureties had been taken, he might have had a remedy against them. Lord DENMAN, C. J. The plaintiff merely gives credit *52] to Gladman for having proceeded earlier *than he really did.] 5. The plaintiff cannot, under the circumstances of this case, recover the costs of his actions against the sureties; *Baker v. Garratt*, 3 Bing. 56. 6. It was for the jury to say whether or not the sheriff had used reasonable caution; *Jeffery v. Bastard*, 4 A. & E. 823; and the summing up on this point is not complained of: but the facts did not, on the principles recognised in the case just cited, warrant a verdict against the sheriff. The verdict is, therefore, against the evidence. 7. Judgment ought to be arrested, because the declaration only denies the sufficiency of the sureties, and does not negative that of Gladman himself; whereas stat. 11 G. 2, c. 19, s. 23, on which this action is founded, requires the sheriff to take a bond from the plaintiff in replevin as well as from responsible sureties; and, unless all were insufficient, the object of the statute may have been fulfilled; *Hucker v. Gordon*, 1 Cro. & M. 58, 67, S. C. 3 Tyr. 107, 118. [Lord DENMAN, C. J. There the replevin was of cattle damage feasant; the proceeding was under 1 stat. 13 Ed. 1 (Westm. 2), c. 2, s. 8, which had been held to require only one surety: the plaintiff in replevin, as Lord LYNDHURST, C. B., observed, might have been sufficient as a pledge; and that would have fulfilled the purpose of the statute.] 8. Another point in arrest of judgment is that the declaration avers only as a breach, that the sureties were insufficient: whereas the sheriff is not responsible absolutely for the sureties, but only if he has omitted to use reasonable care in taking them, which is not alleged here. [WIGHTMAN, J. Is not this the usual form?] It may be so; but the want of *53] reasonable care ought to *be alleged. [Lord DENMAN, C. J. We will speak to my brother COLTMAN.] *Our. adv. vult.*

Lord DENMAN, C. J., on a subsequent day of the term (November 25th), delivered the judgment of the Court.

This case was moved by Mr. *Bovill* upon several grounds. One, that the verdict was against evidence; but, upon consulting the learned Judge who tried the cause (my brother COLTMAN), we do not find he is dissatisfied with the verdict; and we see no reason to doubt the propriety of the verdict of the jury upon the evidence before them. The due care

of the sheriff as to the responsibility of the bail was entirely a question for the jury.

But it was said that there was no proper proof of the execution of the replevin bond, proof of the assignment by the sheriff being held sufficient evidence against him of the due execution of the bond. Upon this point, the case of *Scott v. Waithman*, 3 Stark. N. P. C. 168, is a decisive authority. The sheriff, by taking and assigning the bond, admits its due execution and validity as a bond. The cases cited, of *The Fishmongers' Company v. Robertson*, 1 C. B. 60, and *Slatterie v. Pooley*, 6 M. & W. 664, turned upon very different points, and are clearly distinguishable.

Another objection was, that the declarations of the person who acted as the sheriff's replevin clerk were admitted. As these declarations related to a matter clearly within the scope of his duty as replevin clerk, and were made by him whilst acting as such in the very *matter, [*54 we think they were properly admitted, and that proof of his acting as replevin clerk was sufficient to show *prima facie* that he was so.

It was also said that a writ of *fi. fa.* was improperly received as evidence, because it was not in the replevin suit, but in an action on promises. As this was introduced merely to show the fruitless proceedings that had been taken, we do not think that the admission of that document affords any ground for a new trial.

Another objection was, that the costs of the proceedings against the sureties could not be recovered against the sheriff; and *Baker v. Garratt* was cited. But that case only decided that damages *beyond the penalty of the replevin bond* could not be recovered in an action against the sheriff, which is not the case here; and, therefore, on that ground, the defendant is not entitled to a rule.

In arrest of judgment, it was said that the declaration only charged the not taking two sufficient sureties, without saying anything of the tenant, who might be sufficient. We think there is nothing in this objection. The distrainer has a right to have two sufficient sureties; and, if he has not, is entitled to his action.

One or two other objections were taken, which were disposed of when the motion was made.

There will therefore be no rule.

Rule refused.

*The QUEEN v. The Inhabitants of MYLOR. Nov. 10. [*55

Under stat. 4 & 5 W. 4, c. 76, s. 79, if documentary evidence be used before removing justices, the documents, or copies, must be sent to the parish receiving notice of the order of removal. And this, whether the pauper be removed at the time or not.

Examinations sent with an order of removal showed a complete settlement, by hiring and service, in the parish served with the order: they also showed that the pauper had formerly (after

becoming so settled) been removed by order of justices from the parish now removing to the parish served with the present order: and that the former order was produced before the now removing justices. The former order was described, in the examination of the officer who had executed it, by the date, name of pauper, and names of justices: but no copy of such order was sent with the examinations. Appeal, on the ground, that no copy or extract of such last-mentioned order had been sent:

Held (on a case stated by the sessions, which had confirmed the present order of removal), that the objection was fatal, and that the respondents ought not to have been heard at sessions.

ON appeal against an order of two justices (November 10th, 1844), removing Joseph Symons and Johanna his wife, and their three children, from the borough of Penryn to the parish of Mylor, both in Cornwall, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The case set forth the examination of Joseph Symons, showing a settlement in Mylor by residence under a hiring and service about the year 1810, and concluding as follows. "In the month of September, 1832, I was removed with my wife and children by an order of justices from the said borough of Penryn to the said parish of Mylor; from which there was not any appeal." The case then set forth the examination of John Williams, who stated: "I have been for many years, and still am, the clerk to the justices of the said borough of Penryn: That I, as such clerk as aforesaid, took the examination of the said Joseph Symons on the 10th day of September, 1832, before John Arthur, Esquire, the then mayor, and Edward Hodge, clerk, then the deputy recorder, of the said borough, two of his then Majesty's justices of the peace, having jurisdiction in the said borough, touching *the place of the last legal *56] settlement of the said J. Symons; and that I, as such clerk as aforesaid, made out an order for the removal of the said J. S. and his wife and family from the said borough of Penryn to the parish of Mylor in the said county of Cornwall: which order was signed by the said J. Arthur and E. Hodge, as such mayor and deputy recorder as aforesaid, in my presence; and which said order I now produce." Also the examination of Edward Tregaskis, who stated: "That, in the year 1832, I was the assistant overseer of the said borough, and had to perform all the duties appertaining to the office of overseer. That, on the 13th day of September, in the year last aforesaid, I, as such assistant overseer as aforesaid, removed the said J. Symons, together with, &c. (naming the wife and children), "by virtue of an order bearing date the 10th day of September, in the year last aforesaid, which order purported to be signed by John Arthur, mayor, and Edward Hodge, deputy recorder, from the said borough of Penryn to the parish of Mylor in the said county of Cornwall: and that I, as such assistant overseer as aforesaid, delivered them," &c., to an overseer of Mylor, with a duplicate of the order).

"The following, amongst others, was a ground of appeal.(a) That no copy or extract of the alleged order of removal of the said J. Symons and his family, mentioned in the examination of J. Williams, and therein

(a) No other was mentioned in the case.

stated to have been produced before the removing justices, was sent with the examinations to the appellants; who thereupon insisted that the respondents had no right to enter into their case at all."

The Court of Quarter Sessions reserved the point, *heard the appeal, and confirmed the order, subject to the opinion of this [*57 Court thereon. Should the Court be of opinion that the objection was fatal, then the order of sessions was to be quashed: otherwise, confirmed.

Pashley, in support of the order of sessions. The objection, if well founded, could affect only one branch of the case. The respondents might waive the admission implied by submitting to the former order, and rely upon the settlement itself.

M. Smith, contra, was here called upon by the Court, and referred to *Regina v. Outwell*, 9 A. & E. 886; *Regina v. East Rainton*, (a) and *Regina v. Wellington*. (b) And he cited *Regina v. Brixham*, 8 A. & E. 375, as showing that non-compliance with the requisitions of stat. 4 & 5 W. 4, c. 76, s. 79, is fatal, though the document withheld may have been of no importance to the validity of the order.

Pashley, in continuation. The document not sent, in *Regina v. East Rainton*, was a long pit bond, on which alone the settlement depended: *Regina v. Wellington* was decided, without argument, on the authority of *Regina v. East Rainton*. It cannot be inferred from *Regina v. Brixham*, that, in all cases, every scrap of evidence produced before the removing justices must be sent with the copy of the order of removal. Here the complaining parish produced substantive evidence of a settlement: the evidence as to a former *order was as if the pauper had said before the removing justices: "I have a letter in my pocket [*58 acknowledging me to be settled in Mylor;" and the justices had not called for it: *Regina v. Latchford*, 6 Q. B. 567, shows that respondents having, on the examinations, more than one case, may rely on that which they choose to select. It appears also from *Regina v. Holne*, 9 Q. B. 70, (c) that the removing parish is not bound to transmit, as part of the examinations, everything that passed before the removing justices. If it was irregular to state on these examinations the substance of a document instead of sending a copy, that does not vitiate the whole body of proof; *Regina v. Tetbury*, 11 A. & E. 615, note (a). COLERIDGE, J., in *Regina v. East Rainton*, intimates that, if documents connected with the examinations are not sent, an excuse may be shown for the omission. Here sufficient excuse appears. The respondents could not enforce the giving a copy of the former order. The justices might have required a copy; and it was their error not to embody it in the examinations. [COLERIDGE, J. Suppose four or five distinct settlements are proved before the removing justices, but the removing parish determines to rely

(a) See note (a) at the end of this case, post, p. 62.

(b) Note (a) at the end of this case, post, p. 64.

(c) See *Regina v. Crondall*, 10 Q. B. 812.

on one only. Is it enough to send the examinations relating to that one? If so, the enactment of sect. 79, as to sending a copy of the examination, comes to mean only a copy of so much as the removing parties intend to rely upon when an appeal is tried; and no more need be sent.] But, further, it does not appear that, as yet, the paupers have actually been removed: till they are, the present objection does not arise; there is *locus pœnitentiæ*, and *the copy may still be sent. *59] [COLERIDGE, J. Sect. 79 says, that no pauper shall be "removed or removable" till twenty-one days after the sending of notice with a copy of the order and examination.] A parish need not appeal *quia timet*. [COLERIDGE, J. The use of sending the documents is, that the parish to which the removal is made may decide whether it will appeal or not. The removal may not take place till after the appeal is determined. A tricky parish might keep back the documents to the last moment for the purpose of preventing or frustrating an appeal.] The parish served with the order is not bound to appeal till actual removal: either the order, or the removal itself, may be treated as the grievance; *Regina v. The Recorder of Leeds*, 8 Q. B. 623. And, if a trick were attempted, the sessions might always respite the appeal [*M. Smith*. The point now made was taken in *Regina v. Brixham*, 8 A. & E. 375, and argued upon as now, but without success.] The order of sessions is sufficiently justified on the former ground. The examinations disclose all that is necessary for a settlement, and are not vitiated by something erroneously added for the purpose of giving further information; *Pruett v. Cox*, 2 Com. B. 1. Besides, the objection in the ground of appeal is that "no copy or extract" of the order of removal was sent. But the examinations do furnish an extract.

M. Smith, *contra*, was not further heard.

Lord DENMAN, C. J. The only doubt that still pressed upon the Court was as to the wording of the objection; for an extract is given: *60] but it is, in effect, *objected that, if a copy ought to have been sent, no copy has been sent; and that is the case. I regret that the objection must prevail, because there appears a good settlement, and well proved. But the construction which has been given to the words of the act in many cases, and the universal persuasion as to its meaning, obliges us to hold the objection, as taken, valid. It is argued that the objection does not properly arise, if the paupers have not yet been removed: but, in the majority of cases, the appeal is carried to sessions upon the examinations as they appear before the opposite party is proceeding to actual removal: to interfere with that practice would create doubts where none at present exist, introduce much confusion, and bring former decisions of this Court into question. It has been deemed the certain and undoubted meaning of the statute, that, whether an actual removal takes place on notice, or notice is given without actual removal, the examinations must be sent, in order that the parish about to be

charged may decide whether it will appeal or not. And, if they are to be sent, they must be fully sent. If the overseers were allowed to decide whether or not they should suppress a part of the evidence and send an equivalent, we should let in a current of confusion. As to the document here: it is true that parishes understand what an order of removal means; but, if the actual order might be kept back and merely described in the examinations, there might be many frauds; Thomas might be substituted for William; or one Thomas for another. The provision of the act was intended to prevent the operations of low cunning in matters of this kind: and by interfering with the direct application of the clause we should only produce mischief.

*COLERIDGE, J. I am of the same opinion. The fact here was that the respondents relied on two cases in support of the settle- [*61
ment. The document in question was given in evidence, looked at by the justices, and material to the proof of one ground of removal. We must, then, construe the statute as requiring that a copy should be sent. It is argued that there was another case of settlement, which was sufficient of itself. But that would introduce a distinction which I think the law has not contemplated. If it were available, then, if any number of settlements were proved before the two justices, the removing parish might afterwards elect to proceed on one, and keep back every part of the examinations which in their judgment was not material. We should have to inquire again and again whether the evidence withheld was or was not material; and the extent to which the direction of the statute should be complied with would depend on the proof which the respondents chose to give at sessions. And the statute expressly requires a copy of "the examination upon which such order was made." Then it was contended that this omission was no ground of appeal until actual removal, for that the document might still be sent when the pauper was removed; and, referring to the 79th section, I was at first struck with the argument. But, as my Lord has observed, to give the clause such an effect, would be contrary to the construction generally received: and the words of the clause itself are that the notice of chargeability shall be "accompanied by" a copy of the examination: the object being that the parish receiving notice may be enabled to decide whether they will appeal or not. If they "agree to submit," the removal may take place before the twenty-one days elapse: but on what are they to submit? It must [*62
*be on receiving the examinations. And the words in the outset of the clause are, that no poor person shall be removed "or removable" till the notice and examination are sent: that is, they shall not have the quality of removability till that has been done.

WIGHTMAN, J. I am of the same opinion. The only doubt I had was that which has just been referred to by my brother COLERIDGE; and I think his answer is satisfactory.

ERLE, J. I concur, because it has been expressly decided that a

document, made use of as this was, must be sent with the examinations. I regret deciding so, because here truth is sacrificed to a point of form. It is one of the cases in which a statute intended to bring out truth has been applied for the purpose of getting judgments contrary to truth.

Order of sessions quashed.(x)

(x) The QUEEN v. The Inhabitants of EAST RAINTON. May 31, 1845.

A pauper was removed from G. to R. on examinations showing a settlement by hiring and service in R. under a colliery bond. It appeared, by the depositions, that the bond was produced before the removing justices; but the contents of it, though partially described in the examinations, were not embodied in them; nor was any copy sent with them to the overseers of R. Held, that the sending of such examinations only was not a sufficient compliance with stat. 4 & 5 W. 4, c. 76, s. 79.

And that the omission was not cured by a copy having been sent after service of grounds of appeal but before trial.

On appeal against an order of two justices for the removal of Elisabeth Spence, widow of Robert Spence, and her five children, from the parish of Gateshead to the township of East Rainton, both in the county of Durham, the sessions confirmed the order, subject to the opinion of this Court on a case. The case set forth the material part of the examinations, containing statements as follows.

Elisabeth Spence, the pauper, said: "I am the widow of Robert Spence." "My husband's settlement was in the township of East Rainton in the parish of Houghton le Spring, in the said county of Durham; he gained a settlement in that township by hiring and service; he was a *63] pitman; and at the time of our marriage he was a bound man to the Marquis of Londonderry, to serve him as a hewer for one year from the 5th day of April, 1829, and was serving the said Marquis under that hiring; and he continued to serve him until the 5th day of April, 1830." The examination stated a residence during the service: and it appeared, by another examination, that Spence was unmarried, &c., when hired.

John Robson deposed: "I am colliery viewer for the Marquis of Londonderry, at Rainton colliery; I produce the pit bond by which the Marquis of L. hired his pitmen for Rainton colliery for the year commencing the 5th of April, 1829. It is dated the 21st day of March, 1829, and is made between the Marquis, of the one part, and the several persons who were hired, of the other part; and the several persons who were hired are thereby hired to the said Marquis for one year from the 5th day of April, 1829. Robert Spence, the late husband of the above-named Elisabeth Spence, was thereby hired to the said Marquis for one year, as a hewer. I have brought the said bond from Rainton colliery office, where it is kept with other documents relating to that colliery."

George Spence, brother of Robert, deposed: "I was present when my said brother was hired to the Marquis of Londonderry, the owner of Rainton colliery, for one year from the 5th day of April, 1829, as a hewer. I was bound as a hewer at the same time. I saw my brother set his mark to the pit bond by which he was bound. The mark now shown to me on the bond now produced is my brother's mark. My said brother, under that hiring, duly served the said Marquis as a hewer at Rainton colliery for one whole year."

The following grounds of appeal, among others, were stated. Fifthly: That there were no such binding, &c., and no such residence, &c., as alleged in the examinations. Seventhly: That the alleged hiring was exceptive. Eighthly: That it was conditional, and there was no sufficient service under it. Ninthly: That the justices admitted improper and insufficient evidence of the agreement or pit bond, and of its execution by Robert Spence. Tenthly: That the examinations are imperfect and defective in not setting forth a copy of the agreement or pit bond. Eleventhly: That either the examinations should have set forth such copy, or the churchwardens and overseers of East Rainton should have been served with a copy at the time when they were served with a copy of the examinations. Twelfthly: That the appellants have not been served with a copy of all the examinations, &c., and of the whole of the evidence given before the removing justices.

"At the trial of the appeal, the respondents gave in evidence a memorandum of agreement usually called a pit bond, dated the 21st of March, 1829, made between the Marquis of Londonderry, owner of Rainton colliery, of the one part, and the several other persons whose names or marks were thereunto subscribed, amongst whom was the said R. Spence, deceased, of the other part; whereby," &c. The case then set out some parts of the deed, including several conditions

to be observed by the pitmen, and raising the points taken by the 7th and 8th grounds of appeal. *Spence was proved to have worked at the colliery under this bond for a whole year (with exceptions not now material), and to have resided more than forty days, &c. After the service of the grounds of appeal, but previous to the trial of the appeal, a copy of the bond was furnished to the overseers of the appellant township. [*64]

If this Court should be of opinion against the appellants on the different points raised by the grounds of appeal, the order was to be confirmed; but, in case the Court should be of opinion in favour of the appellants on any one or more of the said points, then to be quashed.

Over, in support of the order of Sessions. It is not necessary that all documents produced before the removing justices should have been sent by respondents to appellants. Stat. 4 & 5 W. 4, c. 76, s. 79, requires that "a copy of the examination" shall be sent. COLERIDGE, J., said, in *Regina v. Outwell*, 9 A. & E. 836, 839, that "'examination' means the entire body of evidence taken on the occasion of making the order:" that is, the oral evidence. If the words of the act extend to documentary evidence, they must at least be confined to such evidence of that kind as the respondents have in their power. [WIGHTMAN, J. No difficulty is stated here; and you did at last send a copy.] A pauper may have become settled by an estate which he has since sold: the title deeds may be produced before the removing justices; but yet no one interested in taking a copy may have control over them for that purpose. [COLERIDGE, J. You say "examination," in sect. 79, means the oral evidence, and such documents as the removing parish has a control over.] In this particular case, the document has been sent; and there is no authority for saying that it is not sent in time: but it is unnecessary to rely on this. The sessions have confirmed the order, and thereby decided that proper information was sent. [COLERIDGE, J. But they decide, subject to a case.] Suppose the appellants had admitted that a document, purporting to be a copy, was sent, but stated as a ground of appeal that the copy was not a true one: that would have been a question of fact, and one of which the sessions only could be the judges. The case here is, in effect, the same. The examinations describe the contents of the bond: and there is no evidence, nor do the sessions find, that the description is not true. It was a question of particularity, and therefore rested with them. [PATTERSON, J. The case finds that the deed contained a number of conditions. Lord DENMAN, C. J. If the sessions had found that anything transmitted was a copy, perhaps we should not interfere. But nothing like that is done. PATTERSON, J. Where do you say the copy begins, in the examinations?] *Over* read the examination of John Robson. [PATTERSON, J. That is not a copy.]

Granger, contra, was not heard.

*Lord DENMAN, C. J. The case is free from all doubt.

PATTERSON, J., concurred.

COLERIDGE, J. Your case goes no further than an excuse for not sending a copy with the examinations; and that is not made out.

WILLIAMS, J., concurred.

Order of sessions quashed.

THE QUEEN v. The Inhabitants of WELLINGTON. Nov. 19, 1845.

Where the parish applying to remove a pauper proves before the justices a former removal, acquiesced in, to the parish now about to be charged, and produces the order of removal, such order, or a copy, must be sent to the latter parish, under stat. 4 & 5 W. 4, c. 76, s. 79.

On appeal against an order of Justices, removing James Hindley and his wife and two children from the parish of Wellington, in Shropshire, to the parish, township or place of the Foreign of Walsall, in the Borough of Walsall, Staffordshire, the sessions quashed the order, subject to the opinion of this Court on a special case.

The case set forth the examinations taken before the removing justices. The examination of Sarah Davies, aunt of the pauper James, showed that James was born in Wellington, and that in 1816, he was removed with the family of his father, Thomas, by an order of Justices, from Wellington to the township of the Foreign of Walsall, where they remained a week, and then returned, by direction of the overseers of the Foreign, to Wellington, where they resided nine months, and were relieved by the Foreign while so residing. Then followed the examination of Samuel Roden, assistant overseer of Wellington, who produced from the parish chest an order which he stated to be that referred to by Sarah Davies, and described it as an order "under the hands and seals of" &c. (naming the justices), "two of his Majesty's justices," &c., "for the removal of Thomas Hindley," &c., "and which bears date the 9th day of December, 1816." The tenth ground of appeal was, substantially, that no such order as mentioned in either examination, nor any true copy thereof, was sent to the appellants. And, when the appeal was called on, the appellants insisted that, on this ground, the respondents should not be allowed to go into their case. The respondents answered that all the examinations had been sent, pursuant to stat.

[*65]

4 & 5 W. 4, c. 76, s. 79; that they distinctly showed that the former order had been produced before the now removing justices, disclosed its nature and that it was produced from the proper place of custody, and pointed out where access to it might be had; and the respondents contended that it was not incumbent on them to send the order, or a copy, to the appellants. The sessions quashed the order, subject as above mentioned. The question for the opinion of this Court was, whether it was necessary or not that the order or a copy should have been sent. If *66] the Court should think that this was necessary, to entitle the respondents to go into their case, the order of sessions was to be confirmed; otherwise to be quashed.

W. J. Neale, in support of the order of sessions, referred to *Regina v. Outwell*, 9 A. & E. 836, and *Regina v. Mildenhall*, 2 Q. B. 517; and cited *Regina v. East Rainton*, ante, p. 62, note (a), as in point.

Corbet, contra, admitted that he could not distinguish this case from *Regina v. East Rainton*, which had not been decided when the present case was set down for argument.

Lord DENMAN, C. J. I think *Regina v. East Rainton* was decided on a right principle.

Per Curiam. (Lord DENMAN, C. J., WILLIAMS and WIGHTMAN, Js.)

Order of sessions confirmed.

The QUEEN v. The Inhabitants of STAINFORTH.

A binding of a parish apprentice by a churchwarden and one of two overseers of a township, is good.

The recital in a parish indenture of an order for binding is sufficient primary evidence before removing justices that such order was made.

An indenture produced before removing justices, had at the foot an allowance by C. and L., "justices of the peace for the West Riding." The order for binding, as recited in the indenture, appeared to be "made by" C. and L. (the same names), "justices of the peace in and for the said Riding."

Held, that the allowance was sufficient: inasmuch as such allowance is merely an act personal to the magistrates, and the place where it is signed need not appear on the instrument.

ON appeal against an order of justices for the removal of William Moore, his wife and their three children from the township of Stainforth to the township of Kirkby Malham, both in the West Riding of Yorkshire, the sessions discharged the order, subject to the opinion of this Court on the following case.

The examinations on which the order was made, so far as they are now material, were as follows.

Examination of William Moore, the pauper. "When I was about ten years of age, being a poor child belonging to the township of Langcliffe in the said West *Riding, I was bound apprentice by the church- *67] wardens and overseers of Langcliffe to John Maugham, then of Kirkby Malham, tailor, with the consent of two justices of the peace, one of them being of the quorum, of the West Riding of the county of York, where the said township of Langcliffe and the said township of Kirkby Malham are situate (the said township of K. M. being within a reasonable distance of the said township of L.), by indenture bearing date the 17th day of July, 1822, from the day of the date of the said indenture until I should attain the age of twenty-one years. I went into the service of the said J. Maugham under the said indenture immediately after the execution thereof, and served him under it for about three years; and I resided," &c. (stating residence as apprentice with Maugham in Kirkby Malham under the indenture.) "About the end of three

years from the time of my binding, my master, the said John Maugham, not having any work, and not being able to provide me with food and clothing, sent me home to my uncle, the said William Kitchen, with whom I remained for many years afterwards, working for him on his farm, and never went back to Maugham, nor served any further under my indenture. Shortly after Maugham sent me back to my uncle, I went with my uncle down to the magistrates' meeting at Gargrave, in the said West Riding, where Maugham also went. Maugham there produced a copy or duplicate of my indentures, I cannot say which, which he delivered to the justices present: and, the circumstances being inquired into, it was agreed my apprenticeship should be dissolved, and the copy or duplicate indenture which Maugham produced was given up to my uncle." The examination of Samuel *Hall stated that in 1822 he was clerk to John Nicholas Coulthurst, Esq., and the Reverend Anthony Lister, justices of the peace of his then majesty, &c., then residing in or near Gargrave, in the West Riding, and attended the petty sessions held by them from time to time, as their clerk; he was attesting witness to the indenture, and proved its execution, and that the said justices subscribed their allowance in his presence. The examination of Richard Foster was as follows. "I was churchwarden of Langcliffe, and William King of Langcliffe was one of the overseers, from the spring of 1822 to the spring of 1823, and during the month of July, 1822.. The indenture of apprenticeship now produced was signed, sealed, and delivered by us on the day of the date thereof, as such churchwarden, and overseer." John Robinson, one of the constables of Langcliffe, proved that he had searched the township chest containing the documents belonging to the township officers of Langcliffe, and there found the indenture of apprenticeship. The indenture was as follows.

"This indenture, made on the 17th day of July, 1822, witnesseth that Richard Foster, churchwarden of the township of Langcliffe in the West Riding of the county of York, and William King, overseer of the poor of the said township, by and with the consent of his Majesty's justices of the peace for the said Riding whose names are hereunto subscribed, and by virtue and in pursuance of an order in writing made by and under the hands and seals of Anthony Lister, clerk, and John Nicholas Coulthurst, Esquire, justices of the peace in and for the said Riding, in pursuance of the statute," &c., "and bearing date the 16th day of July instant, have put and placed, and by these presents do put," &c., "William Moore, aged," &c., "a poor child of the said *township of Langcliffe, apprentice to John Maugham of Kirby Malham, until [the age of twenty-one" (with the usual covenants). "In witness," &c. "R. FOSTER (L. S.), W. KING (L. S.), J. MAUGHAM (L. S.)."

"Sealed in the presence of S. HALL."

"We whose names are hereunto written, justices of the peace for the Riding aforesaid (whereof one is of the quorum), do consent to the put-

ting forth William Moore an apprentice according to the intent and meaning of this indenture, and do sign this our allowance of such indenture of apprenticeship before the same hath been executed by any of the other parties thereto, in pursuance of the statute in such case made and provided. Dated this 16th day of July, A. D. 1822.

“J. N. COULTHURST, ANTH. LISTER.”

On the trial of the appeal, the appellants objected: 1. That the examinations were bad, inasmuch as it did not therein appear that the binding of the said pauper apprentice was by proper officers of the said township of Langeliffe, or that such binding was by a proper and sufficient number of such proper officers. The sessions overruled the objection, subject to the opinion of this Court: 2. That the examinations were bad, inasmuch as they did not show that, previously to the making of the said indenture, any order of justices had been made that the overseer or overseers of the place to which the said William Moore belonged should be at liberty to bind him apprentice, or, if any evidence of such order was set forth in the said examinations, it was secondary evidence, improperly admitted by the justices who made the order appealed against, no evidence having been given before them to account for the nonproduction before them of the said *original or of binding. The sessions overruled this last mentioned objection, subject to the opinion of this Court. 3. That the allowance of the said indenture was bad on the face of it, inasmuch as it did not show that it was made within the jurisdiction of the justices who made the same. The sessions held this last mentioned objection to be fatal, subject to the opinion of this Court. If this Court should be of opinion that any one of these three objections was valid, the order of sessions was to be confirmed; otherwise to be quashed, and the order of removal confirmed.

The case was argued in Trinity term and vacation, 1847, (a) by

Hall and *J. T. Ingham* for the appellants. First. The binding of the paupers was by one churchwarden and one overseer of the township of Langeliffe. But a churchwarden is not by virtue of his office overseer of the poor in a township; *Regina v. The Justices of the North Riding*, 6 A. & E. 863, where the Court came to the conclusion which had been nearly arrived at in *Rex v. Nantwich*, 16 East, 228. The fact of the binding by Foster may, therefore, be considered as struck out of the indenture; and the binding will then appear to have been by one overseer only, contrary to the provisions of stat. 13 & 14 C. 2, c. 12, s. 21, which commits to two or more overseers the execution of all powers for the necessary relief of the poor mentioned in stat. 43 Eliz. c. 2; of which powers that of binding apprentices is one. The general object of the enactment is specified by sect. 2 of the act of Elizabeth, which provides that the churchwardens and *overseers shall meet “to consider of some good course to be taken” in the premises. And by

(a) June 5th and 13th, 1847. Before Lord DENMAN, C.J., PATTERSON, COLERIDGE, and ERLE, J.

sect. 5, the power of binding is vested in the churchwardens and overseers, "or the greater part of them." The only manner therefore in which this binding could be supported would be by intendment, *Rex v. Hinckley*, 12 East, 361, as, that all the overseers were dead but one; *Rex v. Catesby*, 2 B. & C. 814: but, in the present case, Foster, in his examination, states that William King was "one of the overseers" at the date of the binding. Secondly. No order of justices for the binding appears by the examinations to have been produced before the removing justices, or to have been in fact made; the case, therefore, is like *Regina v. Chiswick*, 10 Q. B. 241, note (a). [COLERIDGE, J. The indenture recites such an order.] The appellants are no parties to the indenture. They have been served only with notice of the binding into their parish. The recital is no proof, to the justices called upon to remove, of an order for binding. On this principle it was decided, in *Regina v. East Stonehouse*, 10 Q. B. 230, that the fact of the allowance being made "is quite without weight in helping to the inference" that the order was made; and that to infer so "would be carrying the presumption that all things have been done as required much farther than either reason or authority warrant." The proof of the order for binding is the foundation of the proof of the indenture: and to assume it from the validity of subsequent acts would be directly contrary to the maxim, that no presumption can be made in favour of an act until jurisdiction is shown. Thirdly. It does not appear that the allowance was made by justices within their jurisdiction: which objection was held fatal in the case of a complaint; *Regina v. Stockton*, 7 Q. B. 520: and the reason applies quite as strongly to the case of an allowance, which is a judicial act; *Rex v. Hamstall Ridware*, 3 T. R. 380; and, therefore, necessarily to be performed within the jurisdiction. In the exercise of a statutory power, binding other persons, the authority of the magistrates must appear on the face of the instrument; *Rex v. Austrey*, 6 M. & S. 319, 325.

Pashley and Pickering, contra. The first point was in fact decided in *Rex v. Hinckley*, 12 East, 361: for it was there held that a binding by one churchwarden and one overseer of a township was good, intendment being made that there was only one other overseer and no other churchwarden. In *Regina v. The Justices of the North Riding*, 6 A. & E. 863, the question only was whether, in places where by statute the direction of the poor is given to "overseers," a notice in bastardy, under stat. 4 & 5 W. 4, c. 76, s. 73, must necessarily be signed by the churchwardens also: and on the words of the statute this was held unnecessary. The principle relied upon in support of this binding is recognised in *Rex v. Earl Shilton*, 1 B. & Ald. 275, *Rex v. Catesby*, 2 B. & C. 814, and *Rex v. St. Margaret's Leicester*, 2 B. & Ald. 200: and stat. 54 G. 3, c. 107 (ss. 1, 2), clearly shows that a churchwarden is for this purpose an officer of the poor in a township. Secondly, as to the absence of proof

of the order for binding: in *Regina v. East Stonehouse*, 10 Q. B. 230, the indenture itself was not produced, but the register only; and there *73] was no ground for the *presumption that the same justices who made the order had allowed the indenture. Here the order may be inferred from the reference to it in the indenture, even if it be necessary to seek for argument beyond the ordinary rule of presumption in favour of the right discharge of a public duty, laid down in *Rex v. Whiston*, 4 A. & E. 667, and *Rex v. Whitney*, 5 A. & E. 191. Thirdly. The order for binding appears to have been made by justices in, as well as for, the West Riding: and the same names appear as those of the justices who allowed; therefore it may be fairly inferred that they were the same, and acting in the same place; *Regina v. Ashburton*, 8 Q. B. 871. The ground of the decision in *Regina v. Stockton*, 7 Q. B. 520, was, that the complaint is the foundation of the proceedings; and, for the same reason, it may be requisite that the order for binding should appear to be made within the jurisdiction: but it does not follow that the same strictness is necessary with regard to the subsequent steps: and the allowance may be looked at, not as an instrument by itself, but in connexion with the rest of the instrument: *Rex v. Countesthorpe*, 2 B. & Ad. 487, *Rex v. St. Mary's Leicester*, 1 B. & Ald. 327, *Rex v. Farrington*, 2 T. R. 466, support this view of the case, as well as *Regina v. Silkstone*, 2 Q. B. 520, *Taylor v. Clemson*, 2 Q. B. 978, (a) *Rex v. Verelst*, 3 Campb. 432, 433. But, if it were held that there is on the face of these examinations no sufficient evidence of an allowance within the county, it would be a sufficient answer, that it need not take place within *74] the county. An allowance is purely a *ministerial act. The justices who make it exercise no compulsory authority. They merely allow a proceeding of the parish officers. In *Rex v. Hamstall Ridware*, 3 T. R. 380, the act was clearly judicial, that, namely, of assenting to a parish indenture under 43 Eliz. c. 2. It answered to the "order for binding" under stat. 56 G. 3, c. 139, which is also beyond doubt a judicial act. Now it is clear that a ministerial act may be performed by justices out of the county for which they are in the commission: *Com. Dig. Justices of Peace* (B 1), as to examinations, referring to *Helier v. Hundred de Benhurst*, Cro. Car. 211, 213, 4 Bac. Ab. 619 (7th ed.), tit, *Justices of Peace* (E), 5. [COLERIDGE, J. In the case cited, the decision went on the express ground that no "act of jurisdiction" was performed at all.] It must be added, that, in the present case, it does appear, by the parol evidence of the examination, that the allowance in fact took place within the county. *Cur. adv. ult.*

Lord DENMAN, C. J., in the vacation after this term (December 11th), delivered the judgment of the Court.

In this case the first objection of the appellants was that the binding by an officer stated to be churchwarden of a township, and one of two

(a) Judgment affirmed in Dom. Proc.; *Taylor v. Clemson*, 11 Cl. & Fin. 610.

overseers, was not by a majority of the overseers, as the churchwarden of a township is not for all purposes an overseer of it. But a sufficient answer to this objection is to be found in stat. 54 G. 3, c. 107, s. 2, which makes indentures by the major part of the overseers and persons acting as churchwardens of a township as valid as *indentures by the major part of the overseers and churchwardens of a parish. Upon [*75 this point, we think the sessions were right.

The second objection of the appellants was, that the examinations were bad in not showing the original order for binding, or search for it, so as to make secondary evidence of it admissible. But we concur with the sessions in deciding against the objection. The recital of the order in the indenture certified by the allowance of the justices is in our judgment admissible as primary evidence of the order. It is made in discharge of a duty imposed by stat. 56 G. 3, c. 139, s. 1, and imposed probably for the purpose of making evidence of the order.

The third objection was, that the allowance by the justices was void, because it is not stated to be by justices in the West Riding, but only by justices for it. A rule has been often recognised in respect of proceedings by magistrates, requiring all the facts to be stated which are necessary to show that a tribunal has been lawfully constituted and has jurisdiction. There is good reason for the rule where a special authority is exercised which is out of the ordinary course of common law, and is confined to a limited locality, as in case either of warrants for arrest, commitment or distress, or of convictions, or orders by local magistrates, where the duty of promptly enforcing the instrument is cast on officers of the law, and the duty of unhesitating submission on those who are to obey. It is requisite that the instrument so to be enforced and obeyed should show on inspection all the essentials from which such duties arise. But a certificate that an indenture is in pursuance of an order for binding has none of *these incidents. Effect is given to it without resort [*76 to the powers and duties above described: and the reason for an exact statement of all particulars in the instrument itself ceases. In respect of such an instrument the ordinary maxim for construing in favour of validity may well be applied; the ordinary power of proving by extrinsic evidence essential facts not expressed in the writing may be exercised; and, as the act of approval is personal to the magistrates who made the order for binding, the place where the approval is signed appears to me immaterial.

In *Rex v. Austrey*, 6 M. & S. 319, 321, the language of the Court, overruling an objection to the allowance by two justices of a pauper's certificate because the parish lay in two counties and they were justices for one only, supports the view here taken. "The allowance of a certificate by the justices was not, like the removal of a pauper, strictly an act of jurisdiction, although the justices had a discretionary power to

refuse or allow a certificate; yet the allowance was merely a voucher that credence was due to the acknowledgment of the" parish officers. "For this purpose the justices of either county might be supposed to have a competent knowledge of the parties." Where it appeared that the examination of a party robbed in Berkshire had been taken by a magistrate of Berks in the Temple, it was held valid by Judges of all the Courts, on the ground that the statute did not direct an act of jurisdiction, but gave a direction as to the person who should take an examination: and it was said there was a difference where a justice doth an *77] act to compel another to perform, as to *imprison; such acts cannot be done in any place but where the jurisdiction extends; but informations, and some recognisances, may be taken out of the county; *Helier v. Hundred de Benhurst*, Cro. Car. 211. The examination, under the Mutiny Act, of a soldier for his settlement, is another instrument of the same class. It is essential to its validity that the soldier should be quartered within the jurisdiction of the magistrates taking it. But the Judges, who rejected an examination for a defect on this point, both expressed themselves to the effect that that essential fact might be added by evidence aliunde; and it follows that, in their opinion, it was not necessary to expressly state it in the instrument; *Rex v. All Saints Southampton*, 7 B. & C. 785. Where the jurat of a return under the Bankers' Act, 7 G. 4, c. 46, s. 5, which should be verified on oath before a justice of the peace, purported to be made before A. B., without stating him to be a justice of the peace, but extrinsic evidence of this fact was given, the Court held the return valid; *Bosanquet v. Woodford*, 5 Q. B. 810.

Many inquisitions before sheriffs and others, under railway and other acts, have been attempted to be impeached upon the rule above referred to, and have been decided to be valid, although essential facts were not expressly stated. The Courts have not gone upon the distinction between inquisitions which are in effect certificates of value, and judicial orders; but these cases may well be referred to as showing the necessity for distinguishing between instruments which differ so much in their nature;

*78] *Doe dem. Payne v. The Bristol and *Exeter Railway Company*, 6 M. & W. 320; *Regina v. The Trustees of Swansea Harbour*, 8 A. & E. 489; *Regina v. The Committee Men for the South Holland Drainage*, 8 A. & E. 429; *Taylor v. Clemson*, 11 Cl. & Fin. 610, 636.

Upon the whole, we come to the conclusion that the allowance, which was valid in fact, is not void on account of the form in which it is expressed, and that the sessions are wrong in this respect. Their order therefore is quashed, and the original order confirmed.

Order of Sessions quashed.(a)

(a) The above case is reported by H. Merivale, Esq.

On appeal against a removal grounded on a settlement by binding as apprentice from parish S. in the West Riding of Yorkshire to parish T. in Lancashire, the evidence was the order of justices for putting out the apprentice to a master resident in T.; an indenture, executed by the master, and allowed by two justices of the West Riding; and a service by the pauper under the master in T. The sessions having quashed the order, subject to a case which raised the question whether there was evidence sufficient to raise the presumption that the indenture had been executed by the officers of S. and allowed by justices of Lancashire: This Court held that there was no evidence which made it necessary to adopt that presumption rather than the opposite: and therefore they confirmed the order.

In Regina v. The Inhabitants of Macclesfield, decided in Hilary Term, 1848, where the appeal was against an order for the removal of Ann Holding, the widow of William Holding, and her children, from the township of Macclesfield, in Cheshire, to the parish, township or place of Todmorden and Walsden, in Lancashire, the sessions quashed the order, subject to the opinion of this Court on a case, which was stated in the following words.

The respondents relied upon a settlement gained by the said William Holding in the appellant township by apprenticeship as a parish apprentice, bound by the parish officers of Stansfield, in the West Riding of the county of York, with John Crabtree, who resided in the appellant township in the said county of Lancaster. On behalf of the respondents it was proved that J. Crabtree, before and on the 12th day of September, 1822, being the date of the indenture hereinafter mentioned, was residing in the appellant township; that he continued to reside in the appellant township for about three years after the said twelfth day of September, 1822; and that he and his family then went to America, and had not since been heard of. The said Ann Holding also proved that her husband, W. Holding, died in October, 1845, and that she had never seen any indenture of apprenticeship of his. No indenture executed by parish officers, and allowed by justices, pursuant to the statute 56 Geo. 3, c. 139, was proved; but, to raise a presumption of such indenture having been executed and allowed, an order of justices made for putting out the said W. Holding with the said J. Crabtree, and an indenture of apprenticeship *dated the 12th day of September, 1822, executed by the master, J. Crabtree, and allowed by two justices [79 of the West Riding of the county of York, were put in evidence. It was also proved that the said order and indenture of apprenticeship were found in the town chest of Stansfield aforesaid, and that for several years after the execution of the said indenture the said W. Holding resided with and served the said J. Crabtree as an apprentice in the appellant township. The Court of Quarter Sessions were of opinion that there was not sufficient evidence of the indenture of apprenticeship having been duly allowed by two magistrates duly authorized to make such allowance, and quashed the order of removal. If the Court should be of opinion that the evidence above stated was properly admitted, and sufficient to raise the presumption that an indenture of apprenticeship had been executed by the parish officers of Stansfield, and duly allowed, then the order of Quarter Sessions was to be quashed, and the order of removal confirmed: otherwise the order of sessions to be confirmed.

The case was argued on January 15th, 1848, before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, J., by *Hall* and *Townsend* in support of the order of sessions, and *Pashley*, contra. In support of the order it was contended that nothing appeared on the case which made it necessary for the sessions to presume the execution of an indenture by the officers of Stansfield, and allowance of it by two justices of Lancashire. Among the authorities referred to were *Regina v. East Stonehouse*, 10 Q. B. 230, *Regina v. Chiswick*, 10 Q. B. 241, note (a), *Regina v. Stainforth* (supra), *Rex v. Hamstall Ridware*, 3 T. R. 380, *Regina v. Ashburton*, 8 Q. B. 871, *Rex v. Hinckley*, 1 B. & Ald. 273, *Rex v. Shipton*, 8 B. & C. 772. In opposition to the order were mentioned, among other cases, *Rex v. Whiston*, 4 A. & E. 607, *Rex v. St. Marylebone*, 4 Dowl. & R. 475, *Rex v. Long Buckby*, 7 East, 45, *Rex v. Hinckley*, 12 East, 361, *Mittelholzer v. Fullarton*, 6 Q. B. 989, *Tinkler v. Rowland*, 4 A. & E. 868, 869, dictum of PATTERSON, J., as to *Powell v. Sonnet*, 3 Bing. 381; and the penal clause, sect. 6 of stat. 56 G. 3, c. 139.

The Court said they must understand the question submitted by the case to be whether or not the sessions were bound to presume an execution by officers of Stansfield, and allowance by justices of Lancashire: and that the Court could not say they were bound to adopt that rather than the opposite conclusion. Lord DENMAN, C. J., and COLERIDGE, J., observed that the strongest argument in favour of the presumption arose from the penal clause, but that no regard had been paid to that clause, as raising such a presumption, in *Regina v. East Stonehouse*, 10 Q. B. 230.

(It is not thought necessary to notice the case more fully.)

Order of sessions confirmed.

See the next case.

*80] The following case may conveniently be added here.

The QUEEN v. The Inhabitants of TOTNESS. Jan. 20, 1849.

All judicial acts by persons whose authority is limited as to locality must, on the face of them, purport to be done within the locality.

The act of justices in determining on the propriety of making an order to bind a parish apprentice, under stat. 56 G. 3, c. 139, is judicial; but, on execution of the indenture, their allowance under sect. 1, in pursuance of the order previously made, is not a judicial act, and consequently need not purport to be executed within the jurisdiction of the justices signing it.

Where the justices act, under sect. 2, for the place in which the child is to serve, they determine on the propriety at the time of allowance; and consequently an allowance under sect. 2 is a judicial act, and must, on the face of it, purport to be executed within the jurisdiction of the justices signing.

ON appeal against an order of two justices for the removal of Mary Blight, and her child, from the parish of Holme, in the county of Devon, to the parish of Totness in the same county, the sessions confirmed the order, subject to the opinion of this court upon a special case.

By the case it appeared that an original settlement in the appellant parish was admitted: and the appellants relied on a subsequent settlement alleged to have been gained in the parish of Hulton Abbot, in Devonshire, by service under an apprenticeship. The indenture was proved: it bore date 28th October, 1833; and by it the officers of the poor of Totness bound the pauper, then a poor child of Totness, to serve as apprentice in the parish of Hulton Abbot.

The parish of Totness is situated within the jurisdiction of the magistrates of the borough of Totness, in the county of Devon. The parish of Hulton Abbot is situated in the same county, but out of the jurisdiction of the borough justices.

The indenture of apprenticeship purported to be made in pursuance of the order of two justices of the borough of Totness, and to be allowed by them. It also bore the following endorsement, signed by two justices for the county of Devon.

*81] **“Devon to wit. We, two of His Majesty’s justices of the peace for the county of Devon, do hereby give our consent and allowance to the execution of this indenture, and binding accordingly. As witness our hands this 2d day of November, 1833.”* (Names of the justices.)

Amongst other objections taken by the respondents was the following.

That the jurisdiction of the county justices who allowed this indenture did not sufficiently appear on the face of the allowance, the allowance not purporting to have been made within the county of Devon.

It was on this objection only that the Court expressed an opinion. The rest of the case is therefore omitted.

J. Greenwood and *Rowe* in support of the order of sessions. Stat. 3 & 4 W. 4, c. 63, came into operation on the 28th August, 1833. This indenture was made and allowed shortly after that date; and, though

the parties probably did not know of it, they ought to have complied with the provisions of that statute; and the order should have been by one justice for the borough, and another for the county. (The argument on this point is omitted, as the Court expressed no opinion upon it.) But supposing, that, as contended by the other side, the operation of stat. 3 & 4 W. 4, c. 63, s. 3, is confined to the binding of apprentices to masters resident within the borough, and that the case of an apprentice bound by the overseers of the poor in a borough to a master resident in the same county, though out of the borough jurisdiction, is to be governed by stat. 56 Geo. 3, c. 139, only (as it would be if the residence *of the master were in a different county), still no settlement was acquired under this apprenticeship. Stat. 56 Geo. 3, c. 139, s. [*82 5, expressly enacts that no settlement shall be gained by any child who shall be bound by the officers of any parish, unless "such allowance shall be signed as thereinbefore directed." And sect. 2 enacts that, in all cases where the residence of the person to whom any child shall be bound shall be in a different jurisdiction from that of the justices who made the order, the indenture "shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve: provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child shall be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice." In order, therefore, to enable the pauper to gain a settlement under this apprenticeship, it was necessary that two justices of the county of Devon should have allowed the indenture, and signed their allowance of it; and, that being a judicial act on *their parts, the allowance should have taken place within their [*88 jurisdiction in fact, and it should also purport on the face of it to have been within the jurisdiction of these justices: here the allowance of the two justices for Devon might, for all that appears on the face of it, have taken place out of the county. [WIGHTMAN, J. Would not that argument as much apply to an allowance by two justices under sect. 1?] *Regina v. Stainforth*, ante, p. 66, is a decision to the contrary. But the reasons there given, and the principles laid down in the judgment, show that the allowance under sect. 2 is a judicial act, though that under sect. 1 is only ministerial. By the first section of stat. 56 G.

8, c. 139, it is provided, in terms quite general, that, before any child shall be bound apprentice by the officers of the poor of any parish, the child shall be carried before two justices of the district within which that parish is situated, which justices shall then inquire into the propriety of binding such child apprentice, and particularly make inquiries into many circumstances enumerated in the section; and, if such justices upon such examination and inquiry think it proper, they shall make an order; which order, and the names of the justices making it, shall be referred to in the indenture of apprenticeship; and then the section proceeds: "and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship, before the same shall be executed by any of the other parties thereto." In *Regina v. Ashburton*, 8 Q. B. 871, it was decided that "such justices" in this enactment meant "the same;" and then, taking that construction of

*84] the act (which no doubt is the right one), this Court, in *Regina v. Stainforth*, decided that the allowance of the indenture by the same two justices, who had before judicially decided that the binding was proper, and made their order accordingly, was no more than a certificate that the order was really made by them as recited in the indenture. When once that construction was put upon the act, the rest followed of course: the allowance by the justices who made the order is not a judicial act, and may be performed either in or out of the jurisdiction of the justices: and of course, as it need not in fact be within the jurisdiction, it need not purport to be within the jurisdiction. In *Regina v. Stainforth*, the ground stated in the judgment of the court is that, "as the act of approval is personal to the magistrates who made the order for binding, the place where the approval is signed appears to be immaterial." That reason does not apply to the approval by the justices of the other jurisdiction, who allow under sect. 2: they are not the same justices who made the order: they act for the first time when they allow the indenture; and they are required to allow, not for the purpose of certifying that the order was made by the justices of their jurisdiction, but for the purpose of inquiring and deciding judicially, whether the allowance is proper. Why else should the overseers of the place within their jurisdiction have notice to appear before them? The object must be that they may show cause to the justices why they should not allow the indenture, and that the justices may exercise a judicial

*85] discretion on their objections. In *Rex v. Hamstall Ridware*, 3 T. R. 380, the King's Bench held that justices in allowing a parish apprenticeship act judicially, and must therefore act together. Lord KENYON there says: "when the nature of this case is considered, it appears to be one of the most serious subjects that fall within the decisions of the justices." He then asks: "who ought to judge of the fitness of the persons, to whom the poor children are thus to be apprenticed? Not the overseers—they are frequently obscure people, and perhaps in

managing the business of the parish are not always attentive to the feelings of parents. But the legislature intended that the magistrates should have a check and control over the parish officers in this instance; and in my mind they are called upon to examine with the most minute and anxious attention the situation of the masters, to whom the apprentices are to be bound, and to exercise their judgment solemnly and soberly before they allow or disallow the act of the parish officers; for which purpose it is necessary they should confer together." *Regina v. Stainforth*, ante, p. 66, decides that, where the two justices act under sect. 1 of stat. 56 G. 3, c. 139, their judicial act is performed at the time they make the order, a decision which is in no way inconsistent with the judgment in *Rex v. Hamstall Ridware*; but under the second section the two justices who are not parties to the order must exercise their judgment when they make the allowance, or not at all. It seems impossible to answer the reasons of Lord KENYON for considering their judgment an important judicial act. [PATTESON, J. *Rex v. Mills*, 2 B. & Ad. 578, seems an authority for your proposition. There a *mandamus to two justices to allow an indenture under the second section of this [*86 act was refused, on the ground that the two justices had a general discretion to consider the propriety of the binding.]

Mowbray and Karlake, contrà. [PATTESON, J. As at present advised, I think it is not necessary for the Court to decide upon the construction of stat. 3 & 4 W. 4, c. 63; for it seems a well founded argument on the other side, that (supposing you to be right in contending that that act does not apply) the allowance by the two justices of Devon is a judicial act, and ought to purport to be done within their jurisdiction. Assume, for the purposes of your argument at present, that the statute of 3 & 4 W. 4 does not apply: can you support this allowance under stat. 56 G. 3, c. 139?] Unless *Regina v. Stainforth* is to be overruled, this allowance is good, though the justices have omitted the words "in and" before the words "for the county" which is the sum of the objection. *Regina v. Hamstall Ridware* was a decision on a different statute, that of Elizabeth, and therefore is not in point. And *Rex v. Mills*, 2 B. & Ad. 578, is not more an authority against the appellants here than against the decision in *Regina v. Stainforth*. The reason given in *Rex v. Mills* is, that the justices had a discretion to make an allowance or not, and, therefore, a mandamus was refused. But the justices who have made an order under the first section of the act are not on that account bound to allow it afterwards. It may well be that facts of which they were ignorant at the time of the order may *become known to them before the time of allowance, and convince them that it is not proper to allow the [*87 indenture. It has never been decided that, because they have made the order, they are deprived of all discretion as to allowance; and certainly the Judges in *Regina v. Stainforth* did not mean so to decide. The decision there proceeded on a distinction previously taken in *Regina v.*

Ashburton, 8 Q. B. 871, and pointed out in *Rex v. Austrey*, 6 M. & S. 819, between judicial acts, which others are at their peril to obey at once, as convictions, warrants, and orders, on which everything must appear that can show the jurisdiction, and those acts which, though there is a discretion in the justices, and they are quasi judicial, are not of that nature: in the latter class the jurisdiction, if it exists in fact, may appear by intendment. In *Regina v. Ashburton*, it is expressly said that the allowance under sect. 1 is a judicial act; and in the judgment in *Regina v. Stainforth*, Lord DENMAN, C. J., concludes that "the allowance, which was valid in fact, is not void on account of the form." That will apply here. [WIGHTMAN, J. The Court in *Regina v. Stainforth* do not rely on any such distinction; for they expressly say that "the place where the approval is signed appears to be immaterial;" and your argument must go to the extent, that the place of the allowance here is immaterial, and that the two justices might, in fact, execute it, under the second section, out of the county; for, if not, it ought to purport to be executed within the jurisdiction.] The words of the two sections as to *88] allowance are very similar; and the decision in *Regina v. Stainforth* appears applicable to both sections.

PATTESON, J.(a) The present case is distinguishable from *Regina v. Stainforth*: there the whole transaction was within one single jurisdiction; and the justices who allowed the indenture were necessarily the same who had made the order, and at that time had exercised their judgment on the substantive part of the transaction which fell within their cognisance: they had, under stat. 56 G. 3, c. 139, s. 1, then made inquiries into the circumstances, and had satisfied themselves that it was proper that the child should be bound. I do not say whether, at the time of allowance, it was competent for them to reconsider their decision. That may or may not be: but, in ninety-nine cases out of a hundred the justices who have made the order would, at the time of allowance, inquire only whether the indenture was regular in point of form and in pursuance of their order, and so would, by allowance, complete in form then what they had already decided upon in substance.

But in the present case, the transaction takes place in two jurisdictions; and the child is bound to a person resident out of the jurisdiction of the borough magistrates who made the order, and in that of the county magistrates. That being so, it is required by sect. 2 that the indenture should be allowed by two justices of the county, as well as by the two justices of the borough who made the order; and it is further provided, that "notice shall be given to the overseers of the poor of *89] the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign

(a) Lord DENMAN, C. J., and COLERIDGE, J., were absent.

such indenture, unless one of such overseers shall attend such justice, and admit such notice." What is the purpose for which this notice is required? No notice is to be given before the indenture is allowed by two justices who made the order; but before it is allowed by the other two justices, who then interfere for the first time, the overseers must have notice that they may appear; this must be in order to enable them to make such objections as they think fit; and the two justices must hear and decide upon such objections. They have a discretionary veto; and their act is judicial. *Rex v. Mills*, 2 B. & Ad. 578, shows that they are then, after inquiring into all the circumstances of the case, to determine on the fitness of the binding. They, in substance, do the same thing which the other justices do when they make the order; and their act, in allowing the indenture under sect. 2, is as judicial as that of the other justices in making the order under sect. 1. Then, if the act be judicial, I see no distinction between this case and those in which we have, not once or twice, but often, decided that the justices acting judicially must appear to be acting *in* their jurisdiction as well as *for* it; and, without overruling those cases, the settlement upon which the appellants rely cannot be upheld. Some of those cases, cited in *Regina v. Stainforth*, seem, at first sight, to afford some ground for the argument of the appellants; *but on examination, it will be found that they [*90 are all cases in which the act done might be valid, though done out of the jurisdiction in fact. *Regina v. Stainforth* decides only that, where the whole is under one jurisdiction, and the justices who allow the indenture are the same who made the order, and to whom the circumstances then appeared, and who then adjudicated, their act in allowing it is ministerial. But, under sect. 2, the circumstances appear to the justices for the first time at the time of allowance: they then decide upon them; and therefore their act is judicial, and their jurisdiction must appear on the face of the proceedings. There is no occasion to decide anything upon the construction of stat. 3 & 4 W. 4, c. 63; and I abstain from expressing any opinion upon it.

WIGHTMAN, J. It is a general rule that all judicial acts exercised by persons whose judicial authority is limited as to locality, must appear to be done within the locality to which the authority is limited. Here the authority of the justices is limited to the county of Devon, and the allowance does not appear to have been made within the county; the question, therefore, comes to be, is this a judicial act? It is said by the appellants that the act of the county justices in allowing the indenture is no more judicial than that of the borough justices in allowing the same indenture; and *Regina v. Stainforth* is cited; and that case is also relied upon as an authority by the other side on the same point. The present case has, upon this point, been properly argued, as if the allowance by the two justices *of Devon were made under the second section of [*91 stat. 56 G. 3, c. 189, without considering the effect of stat. 3 & 4

W. 4, c. 63. *Rex v. Mills*, 2 B. & Ad. 578, and also *Regina v. Ham-stall Ridware*, 3 T. R. 380, which were cited in the argument, are authorities to show that the act of two justices, in deciding whether it is proper to allow the binding of a poor child, is a judicial act: *Regina v. Stainforth*, ante, p. 66, shows that, where the justices act under the first section, and are the persons who made the order and consequently at that time made all the preliminary inquiries, they came to their judicial decision upon them when making the order, and the rest, as to them, is merely ministerial in giving effect to their previous decision. But the two justices who act under the second section, and are no parties to the order, cannot allow the indenture till after notice is given to the overseers of the place in which the apprentice is to serve: they have something more than a mere ministerial duty to perform; for the overseers may appear before them, and must be heard; and that appearance and hearing must take place within the jurisdiction of the justices. The present case, therefore, is distinguishable from that of *Regina v. Stainforth*, and comes within the general rule. Orders confirmed. (a)

(a) Reported by C. Blackburn, Esq.

*92] *HARVEY, One of the Public Officers of the LONDON and WESTMINSTER BANK, v. SCOTT, One of the Public Officers of the NEWCASTLE-UPON-TYNE Joint-Stock Banking Company. Nov. 11, 23.

To obtain a scire facias against former members of a banking co-partnership, under stat. 7 G. 4, c. 46, ss. 12, 13, it is enough to show that executions, after scire facias, have been issued against several of the present partners, and nulla bona returned; that reasonable inquiry has been made as to the solvency of all; and that there is on such inquiry ground for believing that execution would not be effectual against any. On this last point, a prima facie case is sufficient.

To prove that a party against whom such application is made was a shareholder at a given time, it is enough to produce certified stamp office returns made, under sects. 4 and 5, by a person styling himself "cashier" of the company.

A party was named as a shareholder in one of such returns, but, in the next return exhibited to the Court, being of the same year, his name did not appear. On the plaintiff's part, affidavit was made of belief that the last-mentioned return was incorrect in omitting the name, and that the party continued a member beyond the time when it was made. Held sufficient ground for presuming that he did so continue, the party himself making affidavit in answer, and not stating any time when, or manner in which, he ceased to be a member, though he denied generally having been a member when the contracts now sued upon were made, and some of these were made before and some after the second return.

It is no answer to the application for a scil. fa., that a party, supposed solvent, who has ceased to be a member, and is not named in the application, was collusively and fraudulently, for the purpose of protecting him from liability, permitted to transfer his shares. Or that another party not named in the application, but still a member, would, if execution went against him, be entitled to indemnity from solvent persons, though unable to pay the amount himself.

It is no answer, on behalf of an individual included in the application, that judgment is entered up in respect of several distinct causes of action, and that, for one of these, such party is not liable.

But in the case of such party it was agreed, on cause shown, and the Court ordered, that the writ should issue on an express undertaking by the plaintiff not to levy against him for more than was actually due.

MARTIN, in last Trinity term, obtained rules to show cause why writs of scire facias should not issue for the purpose of execution in this cause against William Pawson, John Ridley, John Brooke, John Cargill, Francis Sanderson and others, respectively, (a) as *having been shareholders in the Newcastle-upon-Tyne Joint-Stock Banking Com- [*98 pany.

By the affidavit in support of the rule, it appeared that the action was brought to recover a debt of 33,550*l.* 16*s.* 7*d.* and interest, due from the Newcastle Banking Company to the London and Westminster Joint-Stock Bank; that the action was commenced on 3d February, 1847, and final judgment signed on March 3d, 1847, for 136,701*l.* 0*s.* 3*d.*, the nominal debt, and 23*l.* 11*s.* costs. That the Company's Newcastle Bank stopped payment on January 23d, 1846, and was insolvent, having no assets or property. That, on May 5th, 1847, writs of scire facias were issued against ten persons named in the affidavit (see post, p. 94), "all of whom were respectively shareholders for the time being in the said Bank at the time of the issuing of the said writs of scire facias." "That judgments have been signed against all the above-named ten persons for default of appearance to the said writs of scire facias; and" "that writs of fieri facias have been issued upon the said judgments into the counties where the said defendants respectively reside, but that the said executions have proved entirely ineffectual," and the respective sheriffs of the counties have made returns of nulla bona. One of the deponents (clerk to the plaintiff's attorney) further stated: "That he has made all possible inquiries as to the property and situation in life of the above-named ten shareholders, and that the said London and Westminster Bank have also caused inquiries to be made at Newcastle for the like purpose, and that, from the result of such inquiries," deponent verily believed that the returns of nulla bona were correct, and that nothing could be obtained from the executions against those shareholders. He added that by the said inquiries *he had learned the following particulars, [*94 which he believed to be true, respecting the said ten persons. That John Bedlington is a small gardener living near Hexham in Northumberland, who formerly got a subsistence by his labour, but is now insolvent. That John Bell is a young man living with his brother and out of employment and worth nothing. That George Clark is a domestic servant, and worth nothing. That Ralph Coulthard is an engine-smith or engine-builder, but is believed to be worth nothing. That Jacob Dent is a labouring man. That Robert Coxon Ellis is a porter, and worth nothing. That John Hopper is insolvent. That Joseph Hedley was formerly a small provision dealer, but has assigned all his property for the benefit of his creditors, and is worth nothing. That

(a) Each rule was drawn up on reading certain affidavits, and the judgment roll being produced and read; and it called upon the party named to show cause "why a writ of scire facias on the judgment obtained by the plaintiff in this cause should not be issued against him, to enable the said plaintiff to have execution upon the said judgment."

Thomas Johnson is a builder. That Daniel Mackenzie cannot be found, neither his place of residence, which is supposed to be somewhere near London; he is believed to be worth nothing. The deponent further stated that, when the writs of sci. fa. issued, the only other shareholders (with the exception of two, who had since retired) were certain persons, forty-two in number, whose names were contained in a list annexed to the affidavit. Opposite to the names, respectively, were the statements, "dead," "dependent upon her friends," "made assignment to creditors and property divided," &c.; one Jonathan Sills Pidgeon was mentioned as "formerly clerk in an insurance office, now a sharebroker, worth nothing;" and there were other such allegations, showing the improbability of recovering from the parties named: and the deponent averred his belief (after inquiry) that the statements so made were true. He added that he had been informed, and believed that, before the judgment *95] was signed, all the shareholders possessing any *property had ceased to hold their shares, and returns had been filed accordingly: that the persons who were shareholders when the writs of sci. fa. issued, and all of whom still continued so, had little if any property, and none available: and that the only means which remained to the London and Westminster Bank of recovering their said debt were by enforcing payment from those persons who were shareholders of the said Newcastle Company when the contracts upon which judgment was signed as aforesaid were entered into, but who have since retired from being shareholders. That there were actions depending and judgments unsatisfied against the Company to a large amount. That he was informed and believed that nothing would be obtained if execution were issued against all or any of the persons named in the above-mentioned list: and that, if further time were consumed in attempting to enforce payment from them or the other ten, such attempts would be useless, and the London and Westminster Bank would, by reason of the delay, run considerable risk of losing their whole debt. That the declaration in this action contained 37 counts; that the action was brought to recover the amount of 85 bills of exchange mentioned in the first 35 counts of the declaration, and that the 36th and last counts were for money lent and on an account stated, and referred to the bills mentioned in the preceding counts. And that the bills were endorsed by the Newcastle, &c., Company to the London and Westminster Bank on certain specified days, the earliest endorsement being on August 16th, 1845, and the latest (of a bill for 500*l.*) on May 4th, 1846. The last endorsements preceding this were of January, 1846.

*96] The affidavit contained also the following statement *(by the clerk before mentioned) as to the parties against whom the present rules were obtained.

As to Pawson. "That, at the time when the contracts mentioned in the declaration in this action, and on which judgment has been obtained

therein as aforesaid, were entered into, with the exception of the contract mentioned in the 35th count of the declaration, Eliza Ann Pawson of Leeds in the county of York was a shareholder in the said Newcastle," &c., "Bank in and by the name of Eliza Ann Beverley, the said name of Eliza Ann Beverley having been inserted in the return of the said Newcastle," &c., "Bank, made on the 2d day of March, 1844, an official copy whereof is hereunto annexed," "(being before the marriage of the said E. A. Pawson hereinafter mentioned) and also appearing in all the subsequent returns until the return made on the 26th day of March, 1846, under schedule (B) of" stat. 7 G. 4, c. 46 (a copy whereof is hereunto annexed)," "wherein it was stated that the said E. A. Beverley had ceased to be a shareholder in the said Newcastle" &c. "Bank." The affidavit then stated that William Pawson was the husband of E. A. Beverley, having intermarried with her in the latter part of 1844. Copies of returns during the period referred to were annexed, drawn up according to sects. 4, 5, and 8, and schedules (A) and (B), of stat. 7 G. 4, c. 46, and certified according to sect. 6. All these returns, except the last purported to be verified on oath by "Thomas Hirst of Newcastle on Tyne, cashier of the above corporation or copartnership." In the last of March 26th, 1846, he was styled "secretary."

As to Ridley. That, when the contracts mentioned in the declaration, &c., were entered into, except the contract mentioned in the 35th count John Ridley, of, *&c., was also a shareholder in the said Newcastle, [*97 &c., Banking Company, his name having been inserted in the return of that Company made on 2d March, 1844, and appearing in all the subsequent returns until that which was made on 8th April, 1846, a copy whereof was annexed, and wherein it was stated that Ridley had ceased to be a shareholder.

As to Brooke. That, when the contracts, &c., were entered into, except as above, "John Brooke, of," &c., "was, as deponent is advised and believes, also a shareholder in the said Newcastle," &c., "Company, the name of the said J. Brooke having been inserted in the return of the said Newcastle," &c., "Bank, made on the 24th of March, 1845, a copy whereof is hereunto annexed," "and also appearing in all the subsequent returns of the said Newcastle," &c., "Bank until the general return made on the 4th September, 1845,(a) a copy whereof is hereunto annexed." Deponent is "advised and believes that the said last-named return of the 4th September, 1845" (in which Brooke was not named) "is an informal and improper return, and that the said J. Brooke continued to be a shareholder in the said last-named bank until the next general return which was made in the month of March, 1846. And deponent is informed by the officer at Somerset House who has the custody of the returns of Joint Stock Banks that no return has been filed, under schedule (B) of the said last-mentioned act, of the said J.

(a) No intermediate returns were annexed to the affidavit.

Brooke having ceased to be a shareholder in the said Newcastle," &c., "Bank."

As to Cargill, the affidavit was in all material parts the same as that respecting Ridley.

*98] As to Sanderson, the affidavit was in all material respects the same, only giving 19th December, 1846, as the time when he was returned as having ceased to be a member.

After statements of a similar kind as to other parties individually, the affidavit went on to allege that the whole sum of 33,550*l.* 16*s.* 7*d.* and interest still remained due from the Newcastle Company to the London and Westminster Bank, except 900*l.*, which had been received by the Bank since the recovery of the judgment; that the application was not made collusively; and that three years had not elapsed since any of the shareholders, who had retired as aforesaid, ceased to be a member or members.

Pawson made no affidavit in opposition to the rule.

Brooke put in an affidavit, the material parts of which were: "That he was not a partner or member of or in the above-named Newcastle upon Tyne Joint Stock Banking Company at the time when the causes of action in the declaration mentioned, or either of them, accrued in respect of which this action was brought, or at the time when the contracts or either of them were or was entered into upon which the present action is brought, or at the time when the contract or contracts, engagement or engagements, or either of them, were or was entered into on which the judgment in this action was obtained." That, from the time of the said Newcastle Company stopping payment, they have ceased to carry on their business of bankers. That, since the said stoppage and cessation, Henry Bleckley, as the manager, and George Tallentire Gibson, as the solicitor and one of the managing directors, of the said Company, *99] "have at various times transferred to or for the said *last-mentioned Banking Company all and every the shares of many of the persons who were partners or members of and in the said last-mentioned Banking Company at the time of its so stopping payment as aforesaid, including amongst others E. A. Pawson, John Ridley," "John Cargill," &c., mentioned in the first-stated affidavit, "and also including Thomas Cummings Gibson, late of Newcastle upon Tyne, but now of the city of London, coal-owner and merchant, the brother of the said G. T. Gibson: and deponent is advised and believes that the said H. Bleckley and G. T. Gibson had no right or power or authority to make and accept the said transfers or any of them, and thereby defeat or delay the rights and remedies of the creditors" against Pawson, Ridley, Cargill, &c., and Thomas C. Gibson, or any or either of them, "and that the said alleged transfers were without valid consideration and fraudulent, and are null and void, and, therefore," that Pawson, Ridley, Cargill, &c., and Thomas C. Gibson, "notwithstanding such alleged transfers, still are, and

each and every of them is, present partners or members, partner or member," of and in the Newcastle, &c., Banking Company: and deponent submits that "the said plaintiff is bound and ought to exhaust them before having recourse to deponent as a retired partner or member of the said last-mentioned Banking Company: and in particular this deponent saith he is informed and believes that the alleged transfer of the shares of the said Thomas C. Gibson was made without valid consideration, in concert and collusion with the said G. T. Gibson and H. Bleckley, for the purpose of releasing or protecting the said Thomas C. Gibson" from the debts and liabilities of the Company, and defeating or delaying the claims of the creditors *against Thomas C. Gibson as a present partner. The deponent added that he was informed and believed [*100 that Thomas C. Gibson was now carrying on a most extensive business in the county of Durham and city of London, and in the possession of collieries and much other visible property.

Brooke's affidavit further stated that Jonathan Sills Pidgeon, mentioned in an exhibit annexed to the affidavit in support of the rule as one of the present partners in or members of the Newcastle Company, "was, as this deponent is informed and believes, the actuary of the English and Scottish Law Life Assurance and Loan Association, and that the said J. S. Pidgeon, as such actuary as aforesaid, had, on or about the 6th day of September, 1843, certain shares of and in the said last-mentioned Banking Company assigned and transferred to him the said J. S. Pidgeon as trustee for and on behalf of the said Assurance and Loan Association, by virtue of which" he became and was, and still is, "as deponent is advised and believes, a partner and member of and in the said last-mentioned Banking Company, and, as such trustee, was and is entitled to be indemnified by the said" association against every debt and liability which he may have incurred by reason of becoming such assignee and trustee: and that he has lately filed a bill in chancery against the said Association for an indemnity against such debts and liabilities, which suit is now pending. Deponent then added statements as to the solvency of the Association, alleging his belief that the proprietors were capable of paying every liability which Pidgeon had incurred by reason of such assignment and transfer as aforesaid. And he submitted that, under the circumstances, "the *said plaintiff is bound to exhaust the said J. S. Pidgeon, who has his remedy [*101 over against the said Assurance and Loan Association, as hereinbefore mentioned, before having recourse to this deponent or any other person or persons who were or was not partners," &c., in the Newcastle Company when it stopped payment.

Ridley and Cargill made affidavits, each stating that, if he ever was a member of the Newcastle Company (which he did not admit), he had long ceased to be so, and that he was ignorant of the cause of action in respect of which judgment had been recovered, and had no knowledge,

except as he was informed by the affidavit on the other side, of the contract or contracts therein referred to. They also gave details for the purpose of showing that execution might be taken out with effect against persons who were still shareholders.

Sanderson made no affidavit.

Watson and Sir *J. Bayley* showed cause (November 11th) on behalf of William Pawson, and contended that the affidavit for the plaintiff did not show, as conclusively as stat. 7 G. 4, c. 46, s. 13, requires, that "execution" was "ineffectual" against the ten present members as to whom returns of nulla bona had been made. They commented upon the affidavits as to the solvency of these parties, and relied upon *Eardley v. Law*, 12 A. & E. 802; and observed that, in *Field v. Mackenzie*, 4 Com. B. 705, 722, *Wilson*, C. J., doubted (though against the opinion of the rest of the Court) whether it was not necessary to issue execution against all the present shareholders, before resorting to those who had ceased to hold shares. Again: there is no sufficient affidavit of Pawson's wife having *been a shareholder at the time when the contracts were *102] entered into. The only evidence of it is the stamp office return: and that is verified, not by a secretary or public officer according to sect. 5, but by a person styling himself "cashier." The proof ought to be either sufficient at common law or such as will satisfy the express words of the statute. [ERLE, J. The statute does not make it indispensable that the person should appear by the return itself to be a public officer.(a)] Further, it appears that Mrs. Pawson was a member when thirty-four only of the bills were endorsed; therefore the rule cannot be made absolute as prayed, to enable the plaintiff to have execution "upon the said judgment." [WIGHTMAN, J. The execution will be for part of the amount of the unsatisfied judgment, excluding this.] That is not according to the statute. To render a former shareholder liable under sect. 13, it is necessary that he should have been such "at the time when the contract or contracts" "in which such judgment may have been obtained was or were entered into." Judgments should have been obtained on the thirty-four bills and on the one separately.

Sir *J. Jervis*, Attorney-General, contra, was desired by the Court to read his affidavit as to the solvency of the ten former shareholders against whom execution had issued. Having done so, he was stopped by the Court.

Lord DENMAN, C. J. I think that shows sufficient inquiry for the present purpose.

Per curiam.(b)

Rule absolute.

*103] *Granger, for Sanderson, said that, if the Court was satisfied with the affidavits, he should decline showing cause. [Lord DEN-

(a) *Steward v. Dunn*, 12 M. & W. 655, was referred to on this point.

(b) Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, J.

MAN, C. J. They state such a *prima facie* case as a creditor may be expected to furnish. It is for you to give an answer.]

Per Curiam.

Rule absolute, in the terms of the motion.

In the case of Brooke,

Watson and *Cleasby* showed cause. First, there is no sufficient evidence on documents before the Court that Brooke was a partner at any time but on March 24th, 1845. In the return of September, 1845, his name does not appear. It is suggested that this is inaccurate: but the party making affidavit to this effect says only that he "is advised and believes" so. The return of March may as well be inaccurate as that of September. [COLERIDGE, J. The deponent says he is advised and believes that Brooke continued a shareholder till March, 1846.] That is too loose. [WIGHTMAN, J. *Prima facie* he is a partner, till his membership is got rid of.] He himself denies having been a member when the contracts were entered into. [COLERIDGE, J. It would have been very easy for him to state when he ceased to be a partner.] There would be a hardship in requiring him to declare the time during which he was partner, as this might fix him with liability in other transactions. [WIGHTMAN, J. The plaintiff's rule, if now made absolute, will not conclude you. You may dispute the membership on a trial.] [*104] Application for an extraordinary remedy ought not to be made on such vague statements. [Lord DENMAN, C. J. I think that they are not vague, and that they are unanswered. WIGHTMAN, J. The inquiry is only preliminary.] Secondly, Brooke's affidavit shows that execution might be taken out with effect against persons now shareholders, and that fraud has been used to prevent it. [WIGHTMAN, J. If the proceedings have been collusive, as against Brooke individually, may not he plead it to the *scire facias*? Lord DENMAN, C. J. We have directed an issue to try a question of fact arising here in consequence of a motion for a *scire facias*.(a) Why then may not the parties come to issue on the facts now in question?] It would be difficult to plead, and to show, that an execution might at some previous time have been effectual. [ERLE, J. The material time would be that at which the motion was made. The affidavit in support of the rule points to that.] That is shown, as to Pidgeon, on the present motion. [COLERIDGE, J. You say that an execution would be effectual against him, because he would have an equitable remedy against others.] The proper mode of trying these questions, within the meaning of the statute, seems to be on the affidavits for and against the rule. [ERLE, J. The facts which appear for the first time by your affidavits cannot be tried so. COLERIDGE, J. We should be loth to decide the question of collusion upon your answer, which cannot be replied to, if there is any other way of trying it.] Lastly, this rule must be discharged on the ground that Brooke was,

(a) *Bosanquet v. Woodford*, 5 Q. B. 310, appears to be the case referred to.

*105] confessedly, not a member when one of the contracts was entered *into. The judgment is one; and this Court cannot, judicially, sever the damages and costs. The case, as to this point, is like *Firth v. Harris*, 8 Dowl. P. C. 689, where the affidavit of debt was for money paid; the declaration for goods sold, money paid and on an account stated; the plaintiff obtained a verdict, generally, on all the counts; and, a scire facias issuing against the bail, the proceedings were stayed on motion. In *Taylor v. Wilkinson*, 6 A. & E. 538, a similar objection was prevented, the plaintiffs themselves having made a severance.

Sir *J. Jervis*, Attorney-General (with whom was *Bovill*), contra. The last point has already been decided in the case of *Pawson*. But, if it be necessary, the scire facias may issue with a special restriction in these cases; or, if it issue generally, the defendants may plead, so that the execution may be limited. That this is practicable may be inferred from the judgment in *Firth v. Harris*, 8 Dowl. P. C. 689. Then, as to the question of membership, *Brooke* having been a partner in March, the presumption will be that he continued so in September: the informal return in that month does not prove the contrary; nor does *Brooke* show that he ever withdrew. As to the alleged collusion, *Philipson v. Earl of Egremont*, 6 Q. B. 587, shows that it may be pleaded. The release of *Thomas Cummings Gibson*, if it took place as stated, was not the act of those represented by the plaintiff, and cannot alter their right to proceed against other late members of the company. As to *Pidgeon*, whatever might have been the case if he had possessed actual funds, the *106] equitable remedy to which, according *to the affidavits, he is entitled cannot oblige the parties now moving to proceed against him before resorting to the late shareholders. Nothing more is requisite under the statute than a bonâ fide attempt to obtain prymment from the first class of shareholders; and that attempt has clearly been made. The plaintiff is willing to abide by the doctrine laid down in *Eardley v. Law*, 12 A. & E. 802. (*Bovill* was stopped by the Court.)

Lord DENMAN, C. J. This proceeding by scire facias was, I believe, first suggested by Lord TENTERDEN, and has since that time been acted upon as essential to justice in enabling parties charged under the statute to dispute their liability. In the present instance it is shown that the execution sued out against persons now shareholders is ineffectual; and, if that be so, the extent to which it is ineffectual cannot be material: it does not signify that one person may raise 5000*l.* and another 1000*l.*, if the whole debt cannot be raised. The plaintiff then, after exhausting the shareholders for the time being, proceeds against those who were so when the contracts were made. Then the question is, whether Mr. *Brooke* is one of this latter class. Now it is clear that he was so until the 24th of March, 1845, and there is no proof that his name was ever taken out of the partnership. Mr. *Cleasby* observes that the affidavit, stating only that a party "is advised and believes" that *Brooke* was a

shareholder because his name was in the return of March 24th, is too loose: but I think it is good reasoning, and consistent with law, to conclude that a party who has been a member continues to be one till *the connexion ceases by some act; and, if such act has taken place, [*107 the party himself knows, and might state, what it was. But, when he says merely "I was not a partner when such and such contracts were made," we cannot tell what he means to assert: he does not give the requisite information as to fact; and we cannot take his conclusion as to the law. The alleged fraud in releasing Thomas C. Gibson has nothing to do with the liability of other parties, and cannot relieve them. As to the difficulty in proceeding, suggested on behalf of these parties, I see none. A scire facias having been introduced for the purpose I alluded to, and being now a necessary part of the process, the defendant may plead anything which can show that the provision of the act does not apply to him: or he may perhaps bring the question here on motion to set the proceedings aside; in which case the other party would have an opportunity of being heard: whereas, if we decided against a scire facias now, we should be acting on a suggestion of fraud in the affidavit to show cause, which the other party has no opportunity of answering. Lastly, it is said that the judgment is taken in an amount for some part of which Brooke is admitted not to be liable. But, if so, the answer is that we may in some manner restrain the execution against him to that extent: perhaps a writ of inquiry might issue. At all events the Court could take care that, to this amount, the party should not be a sufferer: but I think that, if we refused to hold him liable in any degree under the circumstances stated, we should defeat a proceeding now established for the purpose of giving effect to the Act of Parliament, and which the *Courts have endeavoured to mould so as to effect the purposes [*108 of justice.

COLERIDGE, J. It is contended that to exhaust the first class of shareholders is a condition precedent to the claim of execution against the others, and that Thomas C. Gibson must be deemed one of the first class. But, so far as is shown by the affidavits, he is not in fact a present shareholder; and nowever fraudulent the transfer of his interest might have been, that circumstance would not affect the parties now seeking execution. Then, the first class of shareholders being exhausted, the act gives recourse against the second by a provision on which the Courts have engrafted the proceeding by scire facias: but the clause provides that that recourse to former shareholders shall not be had without leave of the Court. Therefore, the condition precedent being fulfilled, the application is still to our discretion. The fit exercise of that discretion is, that we should not finally prejudice one party or the other by proceeding on materials not sufficient for a decision: and, when, as in the present case, the application is met by new facts, which are said not to be conclusively made out, but to which, on the motion, no reply can be

given, it is our duty to put the case in a course of further investigation.

WIGHTMAN, J. If the objection here made to a *prima facie* case were held good, the decision would be an alarming one to depositors in joint stock banks. The affidavit of Brooke, denying that he was a shareholder when the contracts were made, is unsatisfactory in not stating *109] when he ceased to hold, on which everything *depends. If he can allege anything decisive on that point, he may plead it. As to the collusive transfer of shares: the plaintiff is not charged with being party to the collusion; it does not appear that he could know of it; and, in whatever manner Gibson may have been removed from the partnership, the plaintiff does enough if he tries to make the judgment available against those who appear, *prima facie*, to have been shareholders at the time of the contract, and endeavours to test, by the *scire facias*, whether they are liable to execution or not. It is said that Pidgeon is a shareholder who might have been proceeded against, because, if process issued against him, he has a claim over against other parties, whom he might compel to pay. I think, however, that the statute did not contemplate such a possibility as this, but looked to the ordinary mode of making an execution effectual. And, even if this were not clear, I should think that, in the exercise of our discretion, we should not, for such a reason as this, say that reasonable ground was not laid for the granting of a *scire facias*. As to the point last taken, that, when the contract mentioned in the 35th count was made, Brooke was not a shareholder, it must be remembered that this is not an ordinary *scire facias* on a judgment, but a proceeding under an Act of Parliament framed expressly to provide a remedy against persons who were shareholders at the times when contracts were made; and I think there would be no difficulty in giving such a limit to the proceeding as would fulfil the purpose of the act and at the same time prevent hardship.

ERLE, J., concurred.

*110] *Watson asked if the rule was made absolute generally, or with any special limitation.

The Court declined to make any special order. Rule absolute.

Manisty, on a subsequent day of the term (November 23d), showed cause on behalf of Ridley and Cargill, but forbore, after the decision already pronounced, to argue more than one point. Judgment stands against all the defendants for the total amount claimed; but it is admitted on the affidavits that for the amount claimed under the last count Ridley and Cargill are not liable. The judgment being against the public officer, the defendants have had no opportunity of pleading this; they cannot plead it to the *scire facias*, if issued; and their property and effects will be liable, under stat. 7 G. 4, c. 46, ss. 12, 13, to the whole extent of the sum for which judgment is taken. Either the plaintiff must reduce this amount by entering a *nolle prosequi* or otherwise, or

the scire facias ought to be refused; in which case, if the parties applying suffer, it will be their own fault in taking an excessive judgment. [Lord DENMAN, C. J. Perhaps a writ of inquiry might issue, to ascertain what was really due when the parties showing cause ceased to be partners.] It is hard that persons who were no parties to the judgment should be driven to this proceeding. [WIGHTMAN, J. An action of debt is always brought for more than is actually due; but execution issues only for the real sum: if it be taken out for more, the defendant moves the Court for a reduction.] In ordinary cases the defendant knows what was due: the shareholders here do not. [COLERIDGE, J. No *one obliged you to become shareholders. Lord DENMAN, C. J. [*111 The situation is that in which you have placed yourselves.] At any rate the plaintiff should undertake not to issue execution against Ridley and Cargill for more than the amount due.

Sir J. Jervis, Attorney-General, agreed to this.

Per Curiam.(a)

Ordered: That a writ of scire facias, on the judgment obtained by the plaintiff in this cause, issue against the said John Ridley, to enable the said plaintiff to have execution upon the said judgment: the plaintiff undertaking not to endorse the execution for more than is really due.

The same rule as to Cargill.

(a) Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

*CATHERINE CUMMING v. INCE and Wife and HOOPER and Wife. Nov. 11. [*112]

Plaintiff being confined in a lunatic asylum, and an inquisition under a commission of lunacy being held upon her, and attended by her counsel, before any verdict was given an agreement was signed by her counsel and counsel attending for the promoters of the commission, that the plaintiff should be released from confinement, that certain arrangements should be made as to property which she claimed, that the title deeds relating thereto, which had been taken from her when she was confined, and now were in the hands of the promoters, should be given up and placed in the hands of H., and that the commission should be superseded. Accordingly, plaintiff was released; and the deeds handed over to H. Plaintiff then brought detinue against H. for the deeds. An interpleader rule was obtained, on the claim of the promoters, by which the proceedings were stayed, and a feigned issue brought, by plaintiff against the promoters, to try whether plaintiff was entitled to the deeds notwithstanding the arrangement. Held:

1. That, on the trial of such issue, it was not necessary that plaintiff should prove her title to the deeds, the question being only whether the agreement prevented her from insisting on her title.
2. That it was rightly left to the jury, on evidence of the state of plaintiff's mind and health at the time of the agreement being made, to say whether the consent of her counsel was obtained by constraint and without her free will; and, the jury having so found, that plaintiff was entitled to the verdict: and that the legality of the restraint (assuming it to have been legal), and the consent of counsel, furnished no conclusive proof that the agreement was not void by duress.

THIS was a feigned issue, to try whether the plaintiff was, on 17th December, 1846, entitled to certain deeds and writings specified in the

issue, "notwithstanding a certain arrangement alleged to have been entered into on the 22d day of September," 1846.

On the trial, before ERLE, J., at the Middlesex sittings after Easter term, 1847, the following facts appeared. The plaintiff claimed to be entitled to certain landed property, as tenant in fee, and to the title deeds relating thereto. In May, 1846, at which time she was a married woman, she was forcibly taken to a private lunatic asylum, and there detained till released as hereafter mentioned; and the title deeds, which then were in her dwelling-house, were taken from thence. The two male defendants had married her daughters, the two female defendants. In July, 1846, the husband of the plaintiff died. Afterwards, a commission of lunacy was sued out against the plaintiff, promoted by the defendants; *113] and an inquisition was holden, which *was attended by counsel for the plaintiff on the one side and for the defendants on the other. Before any verdict was taken, an arrangement was entered into, which was reduced to writing, and signed by the counsel on both sides. The material parts were in the words following.

"Re Cumming.

"Promoters to withdraw from further prosecuting inquiry, stating that they had done so under an impression that it was desirable for all parties that an arrangement should be made, that an arrangement had been come to that Mrs. Cumming should be immediately discharged from all restraint; arrangement to be that three trustees should be appointed, in whom property vested; one to be named by Mrs. Ince and Mrs. Hooper, the other by Mrs. Cumming, the third by the commissioner or the two trustees: a deed of settlement to be prepared, under which Mrs. Cumming should be entitled to rents and profits of estates for life: after her death, one-third of annual income to be held by trustees for separate use of Mrs. Ince for life; after her death for her husband, if he survived her; and then to her children: similar arrangement as to Mrs. Hooper." Other regulations as to the property were then specified.

"Deed to carry out arrangement to be prepared by Messrs. Saxon & Hooper, Pump Court, Temple;" "the promoters undertaking forthwith to quash or supersede the commission, or adopt such other steps as may be necessary to put a final end to the proceedings. All the private papers to be given up immediately to Mrs. Cumming. The deeds to be *114] deposited with Messrs. *Saxon & Hooper." "Any dispute or difference in fully effectuating this arrangement to be left to the joint arbitration of" the counsel (naming them).

Signatures of the two counsel.

The plaintiff was then set at liberty, no verdict having been given; and the title deeds, which then were in the custody of the defendants, were placed in the hands of Messrs. Saxon & Hooper. The plaintiff afterwards applied to them for the deeds; which Mr. Hooper then refused to deliver up. The plaintiff thereupon commenced an action of

detinue against him for the deeds. He applied for relief under the Interpleader act: and WIGHTMAN, J., on 9th January, 1847, signed an order, stated to be made "upon hearing the attorneys or agents of the plaintiff and of the claimants John Ince and Catherine Elizabeth his wife, and Benjamin Bayley Hooper and Thomasine Catherine his wife" (the four present defendants), staying proceedings in the action of detinue, requiring the plaintiff to deposit the deeds in the custody of one of the Masters, and ordering an issue to be tried between the present plaintiff and the present defendants, "whether the plaintiff was, at the commencement of the action, entitled to such deeds or writings, or any of them, notwithstanding the arrangement alleged to be entered into on or about the 22d day of September last." The case for the plaintiff now was that the agreement was not binding upon her, as being executed under duress: and evidence was given of the effect produced upon her health by the confinement, and of her distressed state of mind in consequence. The counsel for the defendants offered no evidence, but disputed the duress: and, further, contended that the plaintiff was bound to give evidence of *her title to the deeds. The learned Judge [*115 left to the jury the question only whether the consent of the plaintiff's counsel to the agreement was obtained by constraint and without the exercise of her free will. The jury having found that it was so obtained, his Lordship directed a verdict for the plaintiff.

Watson, in Trinity term, 1847, obtained a rule for a new trial on the ground of misdirection.

Cockburn and *Hance* now showed cause.(a) First, the only question raised on this issue is as to the effect of the arrangement: proof of title on the part of the plaintiff was therefore not wanted: the title was assumed for the purpose of the cause. [*The Court* assented to this.] Then the question is, whether the deed was executed under duress such as to avoid it. No proof was offered that the steps required by stat. 8 & 9 Vict. c. 100, ss. 45, 46, 47, to legalize the restraint of a supposed lunatic, had been taken. The arrangement is therefore invalid, as a contract is of which the only consideration is the forbearance to proceed in an action brought without cause; *Wade v. Simeon*, 2 C. B. 548, 564. But, further, even if the imprisonment had been lawful, the deed would be void. The authorities which may be relied on, as showing the contrary, prove only that, in the case of lawful imprisonment, a deed executed for the purpose of effecting that which is the object of the imprisonment is not void; 2 Bac. Abr. 771 (7th ed.), tit. *Duress* (A); but, if a legal imprisonment be made the means of exacting a deed which is foreign to that object, this is duress; 9 Vin. Abr. 317, tit. *Duress* (B), pl. 1. *Now [*116 here the object of the imprisonment was only the safety of the supposed lunatic. The custody had no reference to any claim on the title deeds; therefore cases like *Longridge v. Dorville*, 5 B. & Ald. 117,

(a) Before Lord DENMAN, C. J., COLERIDEN, WIGHTMAN, and ERLE, Js.

and *Smith v. Monteith*, 13 M. & W. 427, where forbearance from enforcing a claim which may be valid has been held to be a good consideration, do not apply. The fact that the counsel for the plaintiff assented furnishes only evidence from which a jury, if they think fit, may infer that there was no duress: and this was so put, on the part of the defendants, at the trial. If the counsel made the agreement for the purpose of delivering the plaintiff from custody, that was duress. It would be against public policy if the releasing an alleged lunatic were allowed to be the ground of a contract like this.

Watson, contra. First, the argument now used shows that the title was put into question by the issue; for it is now urged as an important circumstance that the defendants had no claim. In *Lott v. Melville*, 3 M. & G. 40, there was a feigned issue whether the plaintiffs were entitled to certain goods, free from an execution: and it was held that they, claiming as assignees, must show themselves entitled as such, by proof of the trading, the petitioning creditor's debt, and the bankruptcy, though no notice of disputing them had been given. Next, where an imprisonment, or other proceeding insisted upon as duress, takes place in the regular course of legal proceedings, there is no such duress as avoids a contract. "If a man be imprisoned by order of law, the plaintiffs may take a feoffment of him or a bond for his satisfaction, and *117] for the deliverance of the *defendant, notwithstanding that imprisonment, for this is not by duress of imprisonment, because he was in prison by course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment or the duress that is offered in the prison, or at large, is tortious and unlawful, for *executio juris non habet injuriam*;" 2 Inst. 482. This doctrine is repeated in the passage mentioned on the other side from 2 Bac. Abr. 771 (7th ed.), tit. *Duress* (A), where Yearb. Hil. 43 Ed. 3, fol. 10 B, pl. 32, is cited in the margin.^(a) *Knight and Norton's Case*, 3 Leon. 239, and *Stepney v. Lloyd*, Cro. Eliz. 646, show that the distinction is between legal and illegal imprisonments. In an Anonymous case in *Levinz*, 1 Lev. 68, a party caused one against whom he had not good cause of action to be arrested and detained in prison till he made a release, with menaces that he should lie there and rot if he would not seal a release: and, on audit & querelâ, it was held that the release so made was not made under duress so as to avoid the deed, he being in custody under the King's writ. [COLERIDGE, J. That was a colourable use of the King's writ: can the case be law?] The action, if colourable, should be impeached in a direct manner. Next, on the facts, the imprisonment was legal. [Lord DENMAN, C. J. You must not argue that the plaintiff was lunatic: for, if so, how could the agreement be good?] It might be executed during a

(a) The objection there seems to have finally been, that the plea of duress did not aver that the bond was made against the will of the defendant: the plea was amended by inserting *contra eam grâs et volens*; which was thereupon traversed by the plaintiff.

lucid interval. But, further, the plaintiff's counsel having concurred, there could be no duress. The case *resembles that of a warrant of attorney given by a prisoner, before the statutory regulation [*118 of 1 & 2 Vict. c. 110, s. 9, in the presence of, and attested by, his attorney. The principle acted upon in giving effect to the agreement of counsel appears in *Furnival v. Bogle*, 4 Russ. 142. *Wade v. Simeon*, 8 C. B. 548, was a very different case from this: there it appeared on the record that the party bringing the action knew it to be groundless. The agreement is not against public policy: no mischief can arise: the Lord Chancellor, if the release ought not to have taken place, may order the proceedings in lunacy to go on; or a fresh commission may issue.

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation after this term (December 11th), delivered the judgment of the Court.

This was a trial of an issue, whether the plaintiff, notwithstanding an arrangement made by her, was entitled to the possession of certain title deeds.

We are, in the first place, clearly of opinion with the plaintiff, that her title to the deeds, independently of that arrangement, was not open to inquiry on the trial; and that the meaning of the issue was, whether the arrangement alluded to prevented her from claiming to hold the deeds though otherwise entitled; as it was by means of that arrangement that they had been handed over by the plaintiff to the defendants.

The arrangement was this. The defendants, plaintiff's daughters, were prosecuting a commission of lunacy against her. On the inquiry into the state of the plaintiff's mind, before the commissioners, after certain witnesses had been examined, it was arranged *that the commission should be dropped on the plaintiff giving up the deeds. [*119 This arrangement was signed by the counsel attending on both sides. On the trial of this issue the plaintiff contended that the arrangement was not binding, because obtained by duress. She had been confined at an asylum, where her health, and even her state of mind, were said to be affected and endangered by the treatment she underwent. The attorneys' clerk swore that he believed such to be the probable effect of her remaining so confined; and, farther, that she acceded to the arrangement only from fear of these consequences.

The argument for the plaintiff was that this confinement was illegal, as she was permitted by the arrangement to go at large; but that, even if lawful, it was a restraint on her will, which prevented any contract made under that duress from binding her. On the defendants' side, it was argued that the legal process set in motion for ascertaining the state of the plaintiff's mind was lawful and *bonâ fide*; and that, even if ill founded in fact, an arrangement made between the parties pending the inquiry was valid and obligatory: and much stress was laid on the necessity of abiding by engagements made by those who represent the inte-

rests of parties litigating in Courts of Justice, more especially when sanctioned by counsel acting for the benefit of both parties. Great weight is due to these considerations, which no doubt ought to be held decisive in any ordinary legal proceeding, when both parties are competent and free to exercise their judgment. But, where one party is alleged to be a lunatic, and threatened with the consequences of that allegation, the parties cannot be considered as meeting on equal *120] terms. The object of proceeding with a commission of lunacy is to establish incompetency to do reasonable acts, and to take the management of the supposed lunatic's affairs, and his person, out of his own hands, and lodge them in others appointed without his consent. How then (it may be asked) can those who apply for the commission affirm that the lunatic is able to negotiate an agreement of which his pecuniary interest and the proper care of his person are the only subjects? We are of opinion that the defendants cannot maintain the plaintiff's competency in the face of their own proceeding. But, if we can assume that the plaintiff was in possession of her right reason, she was the proper person to retain the deeds then in her power, and ought not to have been deprived of them. And, if she was induced to resign them by fear of personal suffering brought upon her by confinement in a lunatic asylum by the act of the defendants, the resignation would appear to be brought about by a direct interference with her personal freedom. Is not this truly described as duress? and was the contract which resulted made with her free will? That her counsel exercised a sound discretion, and did the best for their client's interest, we do not for a moment doubt. But they are not invested by any superior power with the power and duty of guardianship over the lunatic. Their right to act for her is derived from herself alone. As long as she was at liberty, she might authorize them to appear in her behalf and disprove the imputed insanity: but, as she was incompetent (by the hypothesis) from making any contract, she was incompetent to appoint any one to deal for her in relation *121] to her liberty or her property. If, on the other hand, her counsel acted for her, believing her of sound mind, from the same fear of inconvenience and disease, as likely to arise from her confinement, which affected the mind of their principal, their proceeding ought to be considered as enforced by the same duress. Possibly it might have been more for the plaintiff's interest in this case to acquiesce in the arrangement than to question it: but, if it is now questioned on grounds which prove it to have no binding force at law, we have no power to change its nature and say that it shall be carried into effect.

The case, then, was properly laid before the jury when they were asked whether the plaintiff made the arrangement with her own free will: and the jury found a true verdict when they negatived that proposition.

We may observe that, though the peculiar facts of this case are not

assimilated to any former decision, our present opinion does not clash with any, but appears to flow from well regulated principles. And we may add that probably some other arrangement may yet be amicably made, more favourable to the interests of the whole family than any triumph in a court of law.

Rule discharged.

The QUEEN v. The Inhabitants of the Township of LEEDS. Nov. 13.

(PRESTON v. LEEDS.)

Reported 9 Q. B. 910.

*DOE, on the demise of BASTOW and Others, v. COX. [*122
Nov. 15.

Proviso in a deed: A. agrees "to become tenant" to C. and D. of the premises, &c., "at their will and pleasure, at and after the rate of 25*l.* 4*s.* per annum, payable quarterly." A. remained in possession under this agreement for two years, and paid a year's rent; after which the lessors distrained for four quarters' rent.

Held that A. was tenant at will, and not from year to year.

EJECTMENT for premises in Surrey. On the trial, before COLTMAN, J., at the last Surrey assizes, it appeared that the defendant, on June 18th, 1844, mortgaged his interest in the premises to the trustees of a building society, now lessors of the plaintiff, by a deed containing this proviso:

"The said W. Cox doth hereby agree to become tenant to the said R. Bastow," &c., "their executors," &c., "of the premises hereby demised, henceforth, at their will and pleasure, at and after the rate of 25*l.* 4*s.* per annum, payable quarterly."

The defendant retained possession and paid a year's rent, but afterwards made default: in January, 1847, the lessors of the plaintiff distrained for four quarters' rent then due: and on May 6th, 1847, they gave him notice to quit in a week; which not being obeyed, the present action was brought. The defendant's counsel insisted that, by the proviso, he was tenant from year to year, and entitled to six months' notice. COLTMAN, J., was of a different opinion, but reserved leave to move for a nonsuit. Verdict for plaintiff.

Lush now moved(a) that a nonsuit might be entered. The legal operation of the proviso was to create a tenancy from year to year. The Courts have always *favoured such a construction where a yearly rent has been reserved: and the lessors of the plaintiff recognised a yearly tenancy by the distress for four quarters. [ERLE, J. Is there any instance in which the words "at will" have been overlooked?

(a) The case had stood over from the commencement of the term, in order that the deed might be produced.

COLERIDGE, J. "So long as both parties shall please" is very different.] This, under the circumstances, was a tenancy at the pleasure of both.

LORD DENMAN, C. J. The Courts are desirous to presume a tenancy from year to year, where parties do not express a different intention: but here they have expressed it. To hold otherwise would be going beyond any decided case.

COLERIDGE, J. Mr. *Lush* says the rule has been to presume in favour of a yearly tenancy. But it is also a rule that documents shall be construed according to the apparent intention; which, in the present instance, clearly is to create a tenancy at will. Rent, at the rate of 25*l.* 4*s.* per annum, is to be paid quarterly; but that is, if the will continues undetermined: otherwise the reservation by quarters will not take effect.

WIGHTMAN, J. I am of the same opinion. The meaning of the reservation is, that the tenant shall pay at such and such a rate during the time for which he may occupy.

ERLE, J. I am of the same opinion. The intention is, that the tenant shall hold at the will of the lessors, and at will only.

Rule refused.

*124]

*PADWICK v. TURNER.

Declaration, by endorsee of a bill of exchange against acceptor, stated that the drawer required defendant to pay "*three months after the date thereof; which period had elapsed before the commencement of this suit:*" that defendant accepted, and promised to pay the bill "according to the tenor and effect thereof," but "disregarded his promise," and did not pay.

Demurrer, assigning for cause, that the declaration did not show that the three days of grace had elapsed. A Judge at Chambers ordered the demurrer to be set aside as frivolous: and this Court refused a rule nisi to rescind the order.

ASSUMPSIT by endorsee of a bill of exchange against acceptor. The declaration stated that the drawer, on 12th June, 1847, "made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay" to the drawer's order 160*l.*, "three months after the date thereof; which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill:" averment of endorsement to plaintiff and notice to defendant: "and the defendant then promised the plaintiff to pay him the said bill, according to the tenor and effect thereof, and of the said acceptance and endorsement." Breach, that defendant "hath disregarded his promise, and hath not paid the amount of the said bill, or any part thereof."

Special demurrer, assigning for cause that it was not stated that the days of grace allowable upon such bills of exchange had elapsed before the suit; that no breach was shown, inasmuch as it was consistent with the declaration that the bill was not due before the suit; and that the breach did not correspond with the promise.

PATTESON, J., on summons, ordered the demurrer to be set aside, as frivolous. In this term,^(a)

Phipson moved to rescind the order. The "period" "elapsed" is the three months "after the date" of the *bill. It is true that the custom of merchants annexes what Story (Commentaries on the law [*125 of Bills of Exchange, s. 333), calls "indulgence, or respite,"^(b) to the performance of the contract; so that the liability does not arise till three days after the time named in the contract; *Brown v. Harraden*, 4 T. R. 148, 151, 152: but the contract itself, as it appears in the declaration, is to pay in three months. If, as a matter of law, a bill so drawn is drawn for three months and three days, the declaration ought so to describe it, because a contract must be set out according to its legal effect: and it would then follow that, wherever, on a declaration describing the bill in its actual terms, issue is joined upon a denial of the acceptance, there must be a nonsuit when it appears that the custom is to allow the three days. It is true that, where the law itself incorporates a condition into a contract, that condition need not be stated; as where reasonable time for the performance is introduced by legal construction. But there the averment must add that the reasonable time has elapsed. In the old precedents the ambiguity was avoided by stating the bill to be drawn according to the custom of merchants,^(c) and alleging, as breach, that the defendant did not pay according to the tenor and effect of the bill. [COLERIDGE, J. The promise is described here as a promise to pay according to the tenor and effect: then the breach is that the plaintiff "hath disregarded his promise."] It would be very lax, especially on special demurrer, to intend from such averments that three days had elapsed beyond the three months. Would such words, in an action [*126: *against the drawer, supply the want of an averment of regular presentment, dishonour, and notice? It is understood that ALDERSON, B., in a case at chambers, acted upon the view for which the defendant now contends. [Lord DENMAN, C. J. We will inquire whether my brother PATTESON retains his opinion after he has heard what Mr. Baron ALDERSON did.] *Cur. adv. vult.*

Lord DENMAN, C. J., on a later day in this term (November 8th), delivered the judgment of the Court.

In this case we have consulted my brother PATTESON. His opinion is not altered in consequence of what is stated to have been done by my brother ALDERSON in another case. My brother PATTESON thinks there must be some material distinction between the two cases, and is decidedly of opinion that the demurrer in this case is frivolous. We are always very unwilling to interfere with the discretion of a Judge at chambers: in a matter of this kind; and there will be no rule. Rule refused.

(a) November 5th. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

(b) See Chitty on Bills, 374 (ed. 9), and note (u), *ibid.*

(c) This statement was not made in the declaration in the present case.

***127] DOE on the demise of THE COMPANY OF PROPRIETORS
OF THE BIRMINGHAM CANAL NAVIGATIONS,(a) v.
BOLD.**

On ejectment upon the demise of a corporation, it appeared, from defendant's admissions, that he had taken the land by permission of H., a servant of the corporation, and that F., another servant of the corporation, had given him notice to deliver up possession. No lease, nor notice, nor appointment of F. or H. as agent under seal, was produced.

Held, that the jury were rightly directed to find for the plaintiff, if they thought H. and F. were authorized by the company to act.

A tenancy at will, commencing in 1824 and determined in 1831, before the coming into effect of stat. 3 & 4 W. 4, c. 27 (31st December, 1833), is no bar, under sects. 2, 7, to an ejectment commenced in 1847.

EJECTMENT for land in Worcestershire; demise, 1st January, 1847.

On the trial, before ERLE, J., at the last Worcestershire assizes, it appeared that, in 1831, Joseph Smith, an inspector of the canal of the lessors of the plaintiff, by order of John Freeth, a clerk and superintendent of the Company, served notice on the defendant, who was then in possession, that he must give up the land to the Company. The defendant answered that he would not give it up, as Houghton, a former clerk and superintendent of the Company, had told him to take it and use it as a garden. On another occasion, defendant asked whether the Company would allow him a trifle to give it up. It appeared that he had been in possession ever since 1824. No actual lease was produced. For the plaintiff it was contended that this was evidence of a tenancy at will to the Company, commencing in 1824 and terminating in 1831. For the defendant it was argued that the corporation could create a tenancy
*128] at will, or determine it, only by some deed under their *corporate seal, or by means of an assent authorized under seal. The learned Judge told the jury to find a verdict for the plaintiff, if they thought that Houghton and Freeth were authorized by the Company to act as above stated. Verdict for the plaintiff. Leave was then given to move for a nonsuit on the point made for the defendant.

In this term,(b)

J. Gray moved for a nonsuit, or for a new trial, First, as to the authority. The learned Judge appears to have been of opinion that a license would be enough to account for the holding by the defendant. A license, however, must, upon principle, confer a tenancy at will. And, besides, a corporation cannot give a license, except by seal; *Com. Dig. Franchises*, (F 13), referring to *Bro. Abr. Corporations and Capacities*, pl. 50, 51, and *Horn v. Ivy*, 1 Vent. 47, 48. [COLERIDGE, J. A corporation may maintain use and occupation, where they have suffered the

(a) The corporation under that title was first created by stat. 34 G. 3, c. 87. See earlier and later acts, incorporating and uniting companies for carrying on the navigations, from 1 stat. 8 G. 3, c. 38, to stat. 58 G. 3, c. xix. (local and personal, public), recited in stat. 5 & 6 W. 4, c. xxxiv. (local and personal, public), which, by sect. 1, repeals the above mentioned and other acts, and, by sect. 2, reincorporates the Company by the title stated in the text.

(b) November 5th. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

defendant to occupy the land, on an implied promise in consideration of their permission.(a)] In *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 821,(b) the Court of Exchequer class the exceptions from the ordinary rule as to the inability of corporations to do acts without seal: and the granting a tenancy from year to year will not fall under any class there designated.

Next, if the ruling was right on this point, it follows *that there was a misdirection; for then there will have been a tenancy at [*129 will created in 1824, and no action brought within twenty years from 1825; so that, under sect. 2, 7, of stat. 3 & 4 W. 4, c. 27, the action is barred; *Doe dem. Bennett v. Turner*, 7 M. & W. 226.(c) It is true that this tenancy was, on the same supposition, determined in 1831, before the passing of stat. 3 & 4 W. 4, c. 27; and according to *Doe dem. Evans v. Page*, 5 Q. B. 767, sect. 7 does not apply in such a case. But in *Doe dem. Goody v. Carter*, 9 Q. B. 868, 868, this Court held that the section applied to a tenancy at will ending in 1824 or 1829.

Our. adv. vult.

Lord DENMAN, C. J., in this term (November 25th), delivered the judgment of the Court.

In this case there was evidence, in the nature of admission from the conduct of the defendant, that the secretary of the Canal Company, who created the tenancy at will, and the successor who determined it in 1831, had authority from the Company: but there was no direct evidence of authority under seal. The Judge left it to the jury to say whether they inferred an authority, and did not tell them that an authority under seal was necessary. A motion has been made for a new trial for misdirection in this respect: but we are all of opinion that the rule should be refused. The jury were at liberty to infer any possible valid authority; and we cannot assume that a canal company may not be incorporated by private act of parliament, and may not be empowered thereby to appoint [*130 *an agent without an instrument under seal. See *Rex v. Bigg*, 3 P. Wms. 419, 424.

It was further contended that the ejectment was barred by the Statute of Limitations: but it is clear that the determination of an estate at will before that statute passed gives a right of entry commencing at that time; *Doe dem. Evans v. Page*, 5 Q. B. 767. Therefore, there will be no rule.

Rule refused.

(a) See *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829, 839, 840.

(b) See *Regina v. Great North of England Railway Company*, 9 Q. B. 315, 320, 321; *Paine v. Strand Union*, 8 Q. B. 326.

(c) See *Turner v. Doe dem. Bennett*, 9 M. & W. 612.

BOWEN v. OWEN and Another. Nov. 19.

A tender is valid if it implies merely that the party offers a given sum as being all that he admits to be due: but, if it imply also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient.

A tenant sent to his landlord 26*l.* with a letter in these words: "I have sent with the bearer 26*l.* to settle one year's rent of Nant-y-pair." Held a good tender.

REPLEVIN. Avowry and cognisance for 82*l.* 2*s.* 6*d.*, rent in arrear. Plea, as to 55*l.* 10*s.* 4½*d.*, parcel, &c., that no part of that sum was in arrear. As to 26*l.* 12*s.* 1½*d.*, residue, &c., tender, and refusal to accept. The defendants replied, denying the tender: and issue was thereupon joined.(a)

On the trial, before ROLFE, B., at the Carmarthen summer assizes, 1846, the plaintiff proved, in support of his plea of tender, that he had sent a person to the defendant Owen, the landlord, with 26*l.* 5*s.* 7½*d.*, the whole sum due as the plaintiff contended, and the following letter, signed by the plaintiff.

"Dear Sir,—I have sent with the bearer, Thomas Thomas, the sum of twenty-six pounds five shillings and seven pence halfpenny, to settle one year's rent of Nant-y-pair. I am," &c.

The messenger told defendant Owen that he had the money with him *131] to pay; but defendant refused to take it, saying there was more due to him. The messenger went away, but returned, and told defendant that he had some pounds more in his pocket, to pay, in addition to the 26*l.* 5*s.* 7½*d.*, certain arrears of duties payable under plaintiff's lease. Defendant again refused to accept the money brought by the messenger, saying there was more due. It was objected that these offers, coupled with the plaintiff's letter, amounted to no more than a conditional tender. ROLFE, B., ruled that the tender was conditional, and insufficient: but (the jury being of opinion that no more than 26*l.* 5*s.* 7½*d.*, was due for rent) he reserved leave to the plaintiff to move to enter a verdict for him if this Court should hold the tender sufficient: and a verdict was taken for the defendants. *Watson*, in the ensuing term, obtained a rule to show cause why a verdict should not be entered for the plaintiff.

Chilton now showed cause. The rule is that a tender must be without condition or qualification. It is true that, in the most general form of tender, there is an implied assertion that no greater sum is due; but it must not be made an express condition of the payment that the party receiving shall accept the sum paid as the whole balance due. The letter, here, rendered it impossible for the landlord to take the money without impliedly making that admission. *Read v. Goldring*, 2 M. & S. 86, is an instance of an unconditional tender, and would have resembled the tender on the second occasion here, if the offer had not been qualified

(a) There was also an issue on Non tenuit, not material to this report.

by the terms of the letter. In *Eckstein v. Reynolds*, 7 A. & E. 80, where a witness stated that he had tendered 8*l.* to the plaintiff, saying [*132 "at the time that he came to tender it "in settlement of Reynolds's account," Lord DENMAN, C. J., left it to the jury to say whether the tender was conditional or unconditional, saying that he himself was of the former opinion. The jury having found it unconditional, a new trial was moved for, but refused. The Lord Chief Justice said; "here, there was enough of ambiguity to make the matter fit for a jury, and they have decided it:" and LITLEDALE, J., added: "The question, whether a tender be conditional or unconditional, is not necessarily for the Judge. Some cases are clear, others not: the Judge is not bound to take the decision on himself as a matter of law." Here the Judge did, with the assent of both parties, take the decision upon himself; and he ought to have done so, the tender being a written document, and containing a clear qualification. It is said, in the marginal note to *Marsden v. Goode*, 2 Car. & Kir. 133, that "the question, as to whether a tender was made conditionally or not, is for the jury;" but the case does not support that as a general proposition; though, in the particular instance, the question was one of fact. *Evans v. Judkins*, 4 Camp. 156, is one of the cases by which the present must be governed. There the defendant had offered to pay the plaintiff 17*l.* if he would accept it as the whole balance really due; but GIBBS, C. J., said: "Had the defendant offered to pay the 17*l.*, leaving open the plaintiff's right to an ulterior demand, that would have been sufficient; but an offer of payment clogged with a condition that it should be accepted as the balance due does not amount to a legal tender." In *Marquis of Hastings v. Thorley*, 8 Car. & P. 573, the action being for use and *occupation, the pleas [*133 were, tender of 21*l.*, and, as to the rest of the claim, Nunquam indebitatus. There was evidence of 23*l.* being due for rent: the offer proved was: "I tender you 21*l.*, in payment of the half-year's rent due at Lady-day last;" and Lord ABINGER ruled that "this was not a lawful tender, because, if the" plaintiff's "agent had received this money, he would by receiving it have admitted that that sum was the amount of a half-year's rent." *Cheminant v. Thornton*, 2 Car. & P. 50, and *Peacock v. Dickerson*, 2 Car. & P. 51, note, are similar cases, in each of which ABBOTT, C. J., ruled against the tender.

Watson (with whom was *Lush*), *contra*. The tender here did not purport to be in full satisfaction. At most it was equivocal. *Bull v. Parker*, 2 Dowl. N. S. 345, is undistinguishable from this case. There the tender was proved by a witness, who said: "I offered him" (plaintiff) "4*l.*, and I said, I went by the direction of Mr. C. Parker" (defendant), "to pay him 4*l.* in full discharge of his account;" "I did not say, I will pay the money, if you will accept it in full discharge." WIGHTMAN, J., in the Bail Court, held that tender sufficient. In the argument before him, *Henwood v. Oliver*, 1 Q. B. 409, was cited, where the tender proved was

that the defendant's agent produced money to the plaintiff, saying, "I am come with the amount of your bill;" and the Court held it sufficient, observing that "everybody who makes a tender does in effect try to get rid of the plaintiff's demand, by paying only a part of it for the whole."

*134] The party tendering "means," *PATTESON, J., said, "that the amount tendered, though less than the plaintiff's bill, is all that he is entitled to demand in respect of it. How then would the plaintiff preclude himself from recovering more by accepting an offer of part, accompanied by expressions which are implied in every tender? *Expressio eorum quæ tacite insunt nihil operatur.*" WIGHTMAN, J., referring to that case in *Bull v. Parker*, said: "Here, though it is true the words were not the same, and might be capable of a different construction, yet, as the case was not left to the jury, nor any objection made on the part of the plaintiff to the tender when it was proposed, I should take it, that there was no such condition annexed to it when it was made, as would make it amount to this, 'unless you accept this money in full discharge, I will not pay it at all.'" [COLERIDGE, J. The construction here was necessary for the Judge, the question arising on a written instrument: for, although the agent made the tender personally, his authority was limited by the letter.] To make a tender conditional there must be a distinct form of condition: it is not enough that the person tendering says: "I assert this to be all that is due:" he must say: "take this in full discharge, or take nothing." All the authorities are reconcilable with *Bull v. Parker*. [Lord DENMAN, C. J. The question here may be put thus: whether, in an action for the residue, proof of payment, and of receipt by the defendant, under the circumstances proved, would have been proof that the whole was paid.] In *Read v. Goldring*, 2 M. & S. 86, the expression, that the party was "come to settle," by offering a given sum, does not seem to have *been thought inconsistent with

*135] a good tender: and Lord DENMAN, C. J., referring to that case in *Eckstein v. Reynolds*, 7 A. & E. 80, assumed it to be clear that such an expression, accompanying an offer of the money, would not vitiate it. (He was then stopped by the Court.)

Lord DENMAN, C. J. All persons who make a tender in form do so for the purpose of extinguishing the debt. If, in tendering for that purpose, they merely propose that the creditor should take the sum offered and leave it open to him to persist in his claim for more, such a tender is free from objection; but, if a party says "I will not pay this money unless you give a receipt for it as the whole amount due," that is no legal tender. It seems here to have been agreed that the Judge should decide whether the offer was conditional or not; nothing therefore turns on his having done so; but I think his decision on the point was a wrong one.

COLERIDGE, J. The object may have been to impose a condition; but the letter does not, in my opinion, go beyond the terms of a legal tender.

WIGHTMAN, J. Upon the expressions used here, I am of opinion that there was a tender, not conditional; and I think so for the same reasons which weighed with me in *Bull v. Parker*, 2 Dowl. N. S. 345. I acted there principally on the decision of this Court in *Henwood v. Oliver*, 1 Q. B. 409. When that case was before me at nisi prius, my first impression from the authorities on this point was that the proof offered would not support a plea of tender: *but I afterwards thought otherwise; and I am now satisfied that such a tender is sufficient. I [*136 agree in the observations of my brother PATTESON in *Henwood v. Oliver*. His Lordship here read the passage cited, *antè*, p. 133, 134.

ERLE, J. The person making a tender has a right to exclude presumptions against himself, by saying: "I pay this as the whole that is due:" but, if he requires the other party to accept it as all that is due, that is imposing a condition; and, when the offer is so made, the creditor may refuse to consider it as a tender. Rule absolute.

In the Matter of Arbitration between SPOONER and PAYNE.

Where an order of Court was made for payment of costs of a motion to set aside an award, and a ca. sa. was sued out more than a year and a day after the allocatur, the arrest was held to be regular under stat. 1 & 2 Vict. c. 110, s. 18, without scire facias or motion in Court.

MANNING, Serjt., in this term, obtained a rule nisi for setting aside the ca. sa. issued in this cause, and discharging Payne out of the custody of the keeper of the Queen's prison, as to the execution in the said cause. It appeared on affidavit in support of the rule that Payne was taken under a ca. sa. directed to the sheriff of Middlesex for costs lately ordered, by rule of this Court in the above matter of arbitration, to be paid by Payne to Spooner, and which had been taxed at 23l. 1s. The rule (discharging with costs a rule nisi obtained by Payne for setting aside an award in the said matter) *bore date January 30th, 1845; [*137 the allocatur February 7th, 1845. The ca. sa. was tested November 17th, 1846, and was executed on the 26th. The costs had not been demanded; and no scire facias had been served before issuing the ca. sa., nor, as far as was known, had any been sued out: and on these grounds the present motion was made. It was stated, on affidavit against the rule, that no judgment had been signed on the rule of January, 1845, and as the deponent (clerk to Spooner's attorneys) believed, it was not the practice to sign judgment on such rules, or to demand the costs, before issuing execution. In this term, (a)

Whitehurst and *Miller* showed cause. The question is whether, by the provision of stat. 1 & 2 Vict. c. 110, s. 18, (b) a sci. fa. is necessary

(a) November 18th. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, J.

(b) Stat. 1 & 2 Vict. c. 110, s. 18, enacts: "That all decrees and orders of Courts of Equity, and all rules of Courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy,

for issuing execution under a rule of Court awarding costs, when a year
 *138] and a day have elapsed since the rule was made. The statute
 does not, for this purpose, place rules of Court on the footing of
 a judgment. It gives them, to certain beneficial intents, the effect of
 judgments; but it does not make them judgments: on the contrary,
 sects. 18, 19, 22, the last especially, treat rules or orders, and records or
 judgments, as distinct from each other. If rules of Court are to have effect
 generally as judgments, to what extent must the consequence go? Must
 there be a rule for judgment? Will a writ of error lie? And, if so, what
 will be removed? The limited position, that rules shall "have the effect
 of judgments" for the mere purpose of execution, may be understood; but
 to require a scire facias is treating them as actual judgments, and intro-
 ducing the difficulties just pointed out. [COLERIDGE, J. The "effect"
 contemplated may be that after a year and a day there cannot be
 execution, whether a sci. fa. be necessary or not.] At common law
 there was no scire facias to revive even a judgment in a personal
 action; and after a year and a day execution could not issue on the
 judgment, because it was presumed to be satisfied: and the plaintiff
 was put to his action of debt. Then by 1 stat. 13 Ed. 1 (Westm. 2),
 c. 45, a scire facias was given, provided the matter were enrolled
 in some court. But there is no statutory provision for enrolling rules
 of Court; nor has it ever been done. Consequently, there is no
 relief under the statute Westm. 2, in the case of a rule of Court, though
 the party against whom it is made should purposely absent himself for
 a year and a day. It was decided in *Cetti v. Bartlett*, 9 M. & W. 840,
 *139] that an order awarding costs need not be entered of record,
 though it originated in proceedings under the Interpleader Act,
 1 & 2 W. 4, c. 58. The Court held that, although the successful party
 might have entered the order of record under that act, he was not
 obliged to do so if he chose rather to proceed under stat. 1 & 2 Vict. c.
 110, s. 18. The practice as to scire facias for the purpose of execution
 is explained in 2 Inst. 469; and it is observed afterwards, p. 472, that
 the statute Westm. 2, c. 45, is in the affirmative, and does not exclude
 the party from remedies not depending on the statute. [COLERIDGE, J.
 You argue that, on a rule of Court, execution might issue at the end of
 twenty years.] An attachment might issue after that lapse of time,
 independently of the statute. [COLERIDGE, J. Not after four terms,

whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior Courts of common law with respect to matters depending in the same Courts shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

without leave of the Court or a Judge.] If a party obtains a rule for an attachment and keeps it in his pocket for four terms, he must make fresh application to the Court. That is because, in the case of an attachment, the Court is called upon *ex parte* to punish a disobedience; and, when a time has elapsed, during which the order of Court may have been obeyed, the Court ought to have an opportunity of informing itself whether that has or has not been done. But, if there has been an *allocatur*, the party obtaining it may at any time come to the Court for an attachment: the opposite party, if he has in the mean time paid the sum awarded, must move to set aside the attachment with costs. The necessity for obtaining leave in the case of an attachment a year and a day old is not analogous to any incident of a judgment. On a judgment, if the writ is issued in proper season, execution may be had at any time. The hardship, if any, in that case is as great as in the present. *Where a *scire facias* can issue, it is, in the greater number of [*140 cases, a useless expense. Practically, if the attempt were, in a case like the present, to make improper use of the rule of Court, a remedy would be given on motion. That a rule of Court, since stat. 1 & 2 Vict. c. 110, is not equivalent to a judgment, seems to have been the opinion of the Court of Common Pleas in *Farmer v. Mottram*, 6 Man. & G. 684. There it was pleaded, to *scire facias* on a judgment for 94*l.* 12*s.* on a verdict, that, before the giving of the judgment, a rule for a new trial in the cause had been discharged by a rule of court reducing the damages to 1*s.* and ordering payment of costs by defendant; and that plaintiff sued out the *scire facias* after the making of such rule, fraudulently and against good faith. On demurrer to the replication, the defendant's counsel assumed the objection to the plea to be that the effect of a judgment could not be avoided by matter not equally high, but insisted that, since the statute, rules ordering payment of money were of equal effect with judgments. The Court, however, would not allow that the rule could contravene the judgment. [WIGHTMAN, J. TINDAL, C. J., only said that the rule was not made a judgment "for all purposes."] The other Judges clearly consider it a mere rule of Court still. [COLERIDGE, J. How was the rule in that case a rule making a sum of money payable, within the statute? Your argument seems to imply that, in a case like that, there might be two executions, one for the amount of the verdict finally entered up and recovered by the judgment, and the other for the costs.] That might be so, unless the rule provided otherwise. *Stat. 1 & 2 Vict. c. 110, s. 18, [*141 cannot contemplate a *scire facias* in every case where a year and a day elapse; for it relates expressly to orders in lunacy, or in bankruptcy, issuing from the Court of Chancery and Court of Review, on which there is no *scire facias*. By sects. 18, 19, an order in equity binds the lands, if registered in the Common Pleas: but the benefit of such charge, by sect. 18, cannot be obtained for a year.

They then contended that the proceeding without *scire facias*, if improper, did not render the *ca. sa.* absolutely void, but only irregular, and that Payne was debarred from making the present application by lapse of time and by acquiescence: but, as the Court gave no decision on this point, the argument is not reported. *Blanchenay v. Burt*, 4 Q. B. 707, *Sandon v. Proctor*, 7 B. & C. 800, 804 (judgment of BAYLEY, J.), and *Mortimer v. Piggot*, 4 A. & E. 363, note (d), were cited. They also suggested that, if the principal question were doubtful, the Court would not decide it on motion, but leave it to be raised by writ of error; *Benn v. Greatwood*, 6 Scott, 891.

Manning, Serjt., *contrà*. A writ of error would be an absurdity, because, as pointed out on the other side, there is no record. But the ordinary rule, that payment of money due by process of law may be presumed after a year and a day, applies here. If the analogy of an attachment be relied upon, the answer is that there is no affidavit here that the money is not paid. There can be no difference in principle between a rule to show cause and a *scire facias*: indeed a *scire facias* is *142] itself a writ ordering cause to be shown. The Courts have, *by the statute, power to issue a *ca. sa.*; why should not the ordinary practice as to executions apply? No difficulty arises, as has been suggested, from the circumstance that the Courts of equity are placed in the same position as Courts of law; for a Court of equity may issue a *scire facias*. Where judgment is obtained on the common law side of the Court of Chancery, execution cannot be taken out after a year and day without a *scire facias*; *Hodson v. Earl of Warrington*, 3 P.W. 34, 86.

Then, further, if a *scire facias* be necessary, the plaintiff must be discharged, the proceeding being void, and not merely irregular. (The argument on this point is omitted. Besides the authorities before mentioned, reference was made to *Barrack v. Newton*, 1 Q. B. 525, 2 Chit. Archb. 1013 (8th ed.), *Goodtitle d. Murrell v. Badtitle*, 9 Dowl. P. C. 1009, *Putland v. Newman*, 6 M. & S. 179, *Patrick v. Johnson*, 3 Lev. 403, *Anonymous case* in Lord Kenyon's Notes, 1 Ken. 120, *Parsons v. Loyd*, 3 Wills. 341, and *Russel's case*, 4 Leon. 197.(a)) [Lord DENMAN, C. J. We had better inquire what the practice is in all the Courts; possibly we may find it necessary to frame some rule. Clearly the party was not bound here to issue a *scire facias*; but it may be that some sort of motion ought to have been made before taking out execution.]

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of this term (November 25th), delivered the judgment of the Court.

*148] *This defendant obtained a rule for discharging him from imprisonment under a *ca. sa.*, because it had issued on a rule of Court requiring him to pay money under stat. 1 & 2 Vict. c. 110, s. 18, without *scire facias*, or special leave of the Court. We are of opinion

(a) See *Russel's case*, 4 Leon, 24.

that no *scire facias*, or special leave, is made necessary by that act, or by any legal principle; and we learn that, according to the practice now existing, the proceedings are regular. And we discharge the present rule with costs. Rule discharged.

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CARRUTHERS *v.* WEST. Nov. 18.

To a declaration against acceptor on a bill of exchange drawn payable to drawer's order, endorsed by him to B., and by B. to plaintiff, defendant pleaded that he accepted for the accommodation of the drawer and B., without consideration, and on the terms and condition that the bill should be negotiated for their accommodation only before the bill became due: and that the bill was endorsed to plaintiff, and plaintiff became holder after it became due. Held a bad plea, on motion for judgment non obstante veredicto.

ASSUMPSIT on a bill of exchange drawn by John Sewell, directed to defendant, for 30*l.*, value received, payable to Sewell's order, two months after date (which period had elapsed), and then accepted by defendant, and then endorsed by Sewell to George Barclay, who then endorsed to plaintiff: averment of notice to defendant and promise by him to plaintiff to pay according to the tenor and effect of the bill, acceptance and endorsements. Breach: non-payment.

Plea 2. That defendant accepted the bill, "at the request and for the accommodation of" J. Sewell and G. Barclay, "and without any value or consideration whatever; and there never was any value or consideration for the said acceptance" by defendant: and "defendant so accepted the same upon the terms and condition *that the same [*144 might be endorsed and negotiated for the accommodation and use of" J. Sewell and G. Barclay "only before the same became due and payable, and not afterwards." That the bill was endorsed to plaintiff "without the consent, privity or default of" defendant, "after the same became due and payable, and not before that time;" and that plaintiff "did not become the holder" of the bill, "or entitled to the same or to any interest or property therein, until after it so became due and payable."

Replication: *De injuriâ*.

There was also another issue of fact.

On the trial, before COLTMAR, J., at the Summer assizes for Surrey, 1846, a verdict was found for the defendant on the issue first mentioned, and for the plaintiff on the other.

In Michaelmas term, 1846, *Charnock*, for the plaintiff, obtained a rule nisi for judgment non obstante veredicto, or for a new trial.

Willes now showed cause. There is no ground for judgment non obstante veredicto.(a) The allegations which are immaterial to the real defence may be rejected; *Shearm v. Burnard*, 10 A. & E. 593. The

(a) The argument in support of the application for a new trial is omitted

plaintiff did not become holder till after maturity; and he then took the bill liable to all equities upon it: and no person who had the bill before maturity could have recovered upon it, the defendant having accepted upon an arrangement to which Sewell and Barclay were privy, and accordingly to which there was no consideration for *acceptance, and *145] there was to be no endorsing except for their accommodation. In *Sturtevant v. Ford*, 4 Man. & G. 101, (a) which will be cited on the other side, there did not appear any agreement restricting the negotiation. It appears from the language of the Court in *Stein v. Yglesias*, 1 C. M. & R. 565, 567, S. C. 5 Tyrwh. 172, 174, that this fact raises a defence in the case of a bill accepted, as here, before maturity.

Ring, contra. The plaintiff, on this plea, must be taken to be holder for value: and no equity against such a holder arises from the mere fact that the bill was an accommodation bill, and was to be negotiated only for the accommodation of earlier parties, the holder having no notice of this. Bills of exchange may be negotiated after maturity without limit, till they are paid; *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390. It has been intimated, in some cases, as *Chalmers v. Lanion*, 1 Campb. 383, that a party taking a bill after maturity gains no better title than his endorser had: but in *Sturtevant v. Ford*, the Court of Common Pleas decided that such a party may recover, though the acceptance was for accommodation: and they upheld the decision in *Charles v. Marsden*, 1 Taun. 224, (b) where the holders had notice, which is not so here. In *Sturtevant v. Ford*, CRESSWELL, J., suggests that it would be proper to say that a bill after maturity was taken subject to its equities rather than the equities, thereby excluding collateral circumstances and confining the restriction *to what attaches to the bill *146] itself, a view which agrees with *Burrow v. Moss*, 10 B. & C. 558; and this last-mentioned case was upheld in *Whitehead v. Walker*, 10 M. & W. 696. [WIGHTMAN, J. When Barclay got the bill he had power to transfer it and give a title: it is consistent with the plea, that Barclay endorsed to some one before maturity, who, after maturity, transferred to the plaintiff. *Willes*. That should be shown. WIGHTMAN, J. Should not your pleading exclude it?] It does not appear what the Court of Exchequer would have decided, in *Stein v. Yglesias*, 1 C. M. & R. 565, S. C. 5 Tyrwh. 172, after the allegations suggested had been inserted. (He was then stopped by the Court.)

LORD DENMAN, C. J. We think the plea bad.

COLERIDGE, WIGHTMAN, and ERLE, Js., concurred.

Rule absolute for judgment non obstante veredicto.

(a) See pp. 105, 106.

(b) See also *Lazarus v. Cwile*, 3 Q. B. 459, 464.

*HARROLD v. WHITAKER. May 29, 1846. [*147

Declaration in covenant for non-payment of rent, alleged: That, Y. being tenant of premises for a term of 5000 years (from June, 1815), by indenture made between Y., and S., and one L., under whom defendant claimed, after reciting a previous mortgage of the residue of the said term to S. subject to redemption on payment by Y. to S. (not stating covenant to pay, or any day named for payment) of 1200*l.* with interest, which was still due, and reciting that Y. had requested S. (the mortgagee) to join in the present indenture of demise; it was witnessed that S. thereby demised, and Y. (the mortgagor) confirmed, to L., his executors, &c., and assigns, the said premises for 4000 years, a portion yet unexpired of the term of 5000 years, yielding, &c., to S. (the mortgagee), his executors, &c., and assigns, during the continuance of the recited mortgage, and, after payment and satisfaction thereof, to Y. (the mortgagor), his executors, &c., or assigns, the yearly rent of, &c., payable on 25th March and 29th September in each year. The declaration then stated a covenant by L. to S., his executors, &c., and also to Y., his executors, &c., to pay the rent as reserved: assignments by deeds under the seal of S., to one G. of all S.'s interest: and assignments afterwards from G. to the plaintiff by two deeds under the seal of G., conveying successive moieties of the whole: the first deed executed, to wit, 18th February, 1835; the second, to wit, 15th December, 1843: whereby plaintiff "*became and was and is possessed*" of the demised premises for all the residue of the term of 5000 years, subject to the demise. The declaration then alleged an assignment of all the interest, &c., of L., the lessee, to defendant. Breach, that after the making of the demise, and during the term of 4000 years, and while defendant was assignee, to wit, on 25th March, 1844, a sum, to wit, &c., of the said rent for two years of the said term of 4000 years then *last elapsed* became due and in arrear to plaintiff, and the same was not paid to plaintiff or any other person.

Plea: That, *before any part of the arrears of the rent became due*, and during the continuance of the mortgage, to wit, on, &c., S. (the mortgagee) was paid and satisfied all the principal and interest due to him under the mortgage, amounting, &c., out of money arising from the absolute sale of part of the premises, and, when paid to the mortgagee, equal to the amount of such principal, &c.: and that afterwards, to wit, &c., by indenture to which the mortgagor and mortgagee were parties, S. (the mortgagee) acknowledged that he had been paid the whole principal and interest due to him on the mortgage, out of moneys arising from such sale, and released Y. (the mortgagor) from all claims under the mortgage.

On special demurrer to the plea:

Held, by the Court of Queen's Bench, that the plea, by its first averment, set up such a payment as would put an end to the continuance of the recited mortgage within the meaning of the indenture of demise; so that S. the mortgagee (from whom alone the Court considered the plaintiff's title to be deduced) could no longer demand the rent. But that, a distinct answer being offered by the averment, in the plea, of a release by deed, it was bad for duplicity.

That the action was properly brought by the party claiming through the mortgagee, without joining the mortgagor.

That, the alleged mortgage being for an ascertained term of years, it was not necessary to aver in the declaration that the mortgage term continued: but *Seemle* that, if the averment were necessary, it was sufficiently made, the objection being taken as on general demurrer.

That it was not necessary to aver in the declaration continuance of the mortgage debt, for that payment of the debt was a condition subsequent, and in defeasance of the mortgagee's right to recover the rent.

That the declaration sufficiently showed (there being no special demurrer) that the rent sued for accrued after plaintiff became assignee of the term of 5000 years.

The Court of Exchequer Chamber, on writ of error, affirmed the judgment (*Whitaker v. Harrold*, post, 163), and held,

That the plea was bad for duplicity, the payment and release being distinct answers; for, the record not showing any covenant to pay the mortgage debt, it did not appear that a release was necessary to complete the discharge by payment.

That the plea was also bad for not showing with certainty that the original mortgage debt had been paid; or that the release had not been executed by S., the mortgagee, after he had assigned the premises.

That the action was brought by the right party, the covenant to pay rent not becoming a covenant in gross till after payment of the mortgage debt.

That the payment was a condition subsequent, and the plaintiff not bound to aver non-performance of it.

That the rent sufficiently appeared to have become due after the assignment to plaintiff, because the dates, being material, must be deemed correct, though laid under a videlicet; and by them the plaintiff appeared entitled to some rent for two years since the assignment; and the Court of error could not inquire whether the Court below had awarded as damages more than the precise amount of rent due.

COVENANT on an indenture of demise. The declaration stated that, before and at the time of the making of the demise and confirmation after *mentioned, viz. 17th August, 1820, James Eyre Salmon *148] was lawfully possessed of the tenements and premises, with the appurtenances, hereinafter mentioned to have been demised, that is to say, for the residue of a term of years more than sufficient to enable him, Salmon, to make the demise hereinafter mentioned to have been made by him, and which said term hath not yet expired; that is to say, for the residue of a certain term of 5000 years, commencing, to wit, on 24th June, A. D. 1815, then to come and unexpired therein. And, being so possessed thereof, by indenture then made between one Benjamin Yeoman of the first part, the said J. E. Salmon of the second part, and one Robert Lee of the third part, the counterpart of which, &c. (profert of counterpart sealed by the several parties), the date whereof is a certain day, &c., there mentioned, viz. 17th August, 1820, reciting a certain indenture of assignment of 5th August, 1818, made between the said B. Yeoman of the first part, George Porch and John Whitney Watts of the second part, John Hodder of the third part, and the said J. E. Salmon of the fourth part, "whereby the tenements and premises hereinafter *149] mentioned to have been demised were, amongst *other hereditaments, assigned to" Salmon, his executors, administrators, and assigns, for all the then residue of the said term of 5000 years (therein mentioned to have been created by one Robert Blunt by indenture of 1th August, 1815), "subject to redemption on payment by the said B. Yeoman, his executors, administrators, or assigns, to the said J. E. Salmon, his executors, administrators, or assigns, of 1200*l.* with interest for the same, which said sum remained due and owing" to Salmon; and also reciting that Yeoman had agreed to grant to the said Robert Lee a lease of the said tenements and premises upon the terms and in manner thereinafter mentioned, for which purpose he had applied to and requested Salmon to become a party to, and join in, the execution of the said indenture of demise: It was witnessed that, for and in consideration of the rent, covenants, and agreements thereafter reserved and contained, by and on the part and behalf of Lee, his executors, &c., to be paid, done, and performed, the said J. E. Salmon, at the request of the said B. Yeoman, had demised, leased, and by those presents, as far as he could and had right and interest, did demise and lease, and the said B. Yeoman, had granted, demised, leased and confirmed, and by those presents did grant, demise, lease, and confirm, unto the said R. Lee, his executors, administrators, and assigns, a certain piece or parcel of ground,

&c., and messuages, &c. (in this indenture described): Habendum to Lee, his executors, &c., from 25th March, then (to wit, at the time of the date of the said indenture) last past, that is to say, 25th March, 1820, for the term of 4000 years thence next, &c.: "Yielding and paying therefore, yearly and every year during the *said term, unto the said J. E. Salmon, his executors, administrators, and assigns, [*150 during the continuance of the said hereinbefore recited mortgage, and, after payment and satisfaction thereof, unto the said B. Yeoman, his executors, administrators, or assigns, the yearly rent of 18*l.* 18*s.* of lawful," &c., by equal portions, on, &c. (29th September and 25th March; first payment on 29th September then next), free and clear of all taxes, &c., except the ground rent due to the said R. Blunt (which Yeoman thereby covenanted to pay, or to allow out of the rent): "And the said Robert Lee did thereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said J. E. Salmon, his executors, administrators, and assigns, and also to and with the said Benjamin Yeoman, his executors, administrators, and assigns, in manner following, that is to say: That he, the said R. Lee, his executors, &c., should and would well and truly pay or cause to be paid the said yearly rent or sum of 18*l.* 18*s.*, free and clear of all deductions as aforesaid, on the several days and times and in manner as the same was thereinbefore reserved and made payable: As by the said indenture," &c. By virtue of which said demise, &c.: Averment that Lee, to wit, on the day and year last aforesaid, entered and was possessed for the term to him granted.

The declaration then alleged that, Salmon being so possessed of the demised tenements, &c., for the residue of the term of 5000 years subject to the demise, by a certain indenture afterwards, viz., on the 6th February, 1821, made between Yeoman of the first part, Salmon of the second, George Porch of the third, and George Hicks Seymour of the fourth part; profert of the indenture *"sealed with the seal of [*151 the said James Eyre Salmon," the date whereof is a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid, the said J. E. Salmon, for the considerations, &c., did bargain, sell, assign, transfer, and set over to the said Seymour, his executors, administrators, and assigns, one undivided moiety or equal half part of and in the demised premises, and all Salmon's estate, &c., in that moiety, for all the residue of his term of 5000 years subject to the said demise for 4000 years; as by the last-mentioned indenture, &c.: by virtue of which last-mentioned indenture Seymour, to wit, on the last-mentioned day, became, and from thence until and upo: the making the indenture of assignment after mentioned to have been made by Seymour, was possessed of the said undivided moiety, &c., for the residue of the said term of, to wit, 5000 years, subject as aforesaid, so to him assigned by the said J. E. Salmon as aforesaid. The count further alleged that,

Salmon being so possessed of the demised tenements, &c., for the residue, &c., subject, &c. (as before), by a certain other indenture then thereupon afterwards, to wit, on 6th February, 1821, made between Yeoman of the first part, Salmon of the second, John Hodder of the third, Porch of the fourth, and Seymour of the fifth part; profert of the indenture "sealed with the seal of the said J. E. Salmon," the date whereof is a certain day and year therein, &c., to wit, the day and year last aforesaid, the said J. E. Salmon, for the considerations, &c., did bargain, &c.; the count then stated, in the same words as those relating to the before-mentioned moiety, a bargain, sale, and assignment to Seymour, his executors, &c., of an undivided moiety, &c., of and in the said demised *152] tenements, &c., being the moiety, &c., other than and distinct from the moiety, &c., assigned by the last preceding indenture, and all the estate, &c., for all the residue, &c., subject, &c.; as by the said indenture, &c.: and possession by Seymour of the last-mentioned moiety for the residue, &c., by virtue of the indenture, until the next-mentioned assignment.

That, Seymour being possessed of the moiety alleged to have been assigned to him by the last-mentioned indenture, for the residue, &c., subject, &c., "by a certain other indenture then thereupon afterwards, to wit, on the 15th day of December, A. D. 1843," made between Luke Perman of the first part, Seymour of the second, and plaintiff of the third part; profert of the indenture "sealed with the seal of the said G. H. Seymour," the date whereof is "a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid," the said G. H. Seymour, for the considerations, &c., did bargain, sell, &c.; stating an assignment by Seymour to plaintiff, his executors, &c., of the last-mentioned moiety which had been assigned by Salmon to Seymour by the indenture hereinbefore alleged to have been made between Yeoman, Salmon, Hodder, Porch, and Seymour, and all the estate, &c., of Seymour therein for all the residue, &c., subject, &c.; as by the said indenture, &c. By virtue of which, &c.; possession by plaintiff until and after the commencement of this suit. The count then alleged, in like form, an assignment by Seymour to plaintiff, his executors, &c., of the other moiety, by indenture, made "to wit, on" 18th February, 1835, between Joseph Oxley and James Edward Gillmore of the first part, Porch of the second, Seymour of the third, Perman of the fourth, *153] and plaintiff of the fifth part; profert of the indenture "sealed with the seal of the said G. H. Seymour," the date whereof is a certain day and year therein, &c., "to wit the day and year last aforesaid:" by virtue of which, &c.; averring possession by plaintiff, as before. "And the plaintiff then thereupon also, by and by means of the two lastly stated indentures, became and was and is possessed of the entirety of the said demised tenements and premises," &c., "for all the residue and remainder of the said term of to wit 5000 years, subject

to the said demise for 4000 years so made to the said Robert Lee as aforesaid.

The declaration then alleged that, after the making of the demise and confirmation of, to wit, the 17th August, 1820, and during the term of 4000 years, and before the commencement of this suit, to wit, on 30th November, 1841, all the estate, interest, and term, &c., of Robert Lee of and in the demised tenements, &c., by assignment thereof, &c., legally came to and vested in defendant.

Breach: that, although the said J. E. Salmon and the said B. Yeoman and the said plaintiff, &c., have respectively, &c.; averment of performance by them of all things in the said indenture of, to wit, 17th August, 1820, contained, on their parts, &c.; "Yet the plaintiff saith that, after the making the said last-mentioned indenture, and during the said term of 4000 years thereby granted, and after the defendant became such assignee as aforesaid, and while he continued such assignee, and before the commencement of this suit, to wit, on the 25th day of March, A. D. 1844," the same day, &c., being, &c. (averment that this was one of the days for payment of equal portions of the rent according to the *last mentioned indenture), "a large sum of money, to wit, the sum of [*154 37l. 16s., of the rent aforesaid, for two years of the said term of 4000 years, then last elapsed, became and was, and still is, in arrear and unpaid to the plaintiff, contrary to the tenor," &c., of the said indenture of demise and confirmation, and of the said covenant so made as aforesaid. And that neither Lee, his heirs, executors, &c., nor any other person, "hath paid the said sum of money or any part of the same to the plaintiff or to the said Benjamin Yeoman, his executors, administrators, or assigns, or to any other person or persons whomsoever; and the same sum" "doth now remain wholly unpaid and unsatisfied to any person whatsoever. And so the plaintiff in fact saith," &c. (the common conclusion).

Plea. "That before any part of the arrears of the said rent in the declaration mentioned and alleged to be due and in arrear became or was due, and after the making of the indenture of demise and confirmation in the declaration first mentioned, and of the said mortgage therein mentioned, and during the continuance of the said mortgage, and after the said principal sum of 1200l. and interest for the same became due, and before the commencement of this suit, to wit, on the 1st day of January, A. D. 1821, and on divers other days and times between that day and the 6th day of June, A. D. 1822, the said J. E. Salmon was paid and satisfied all the principal moneys and interest due to him the said J. E. S. under or by virtue of the said mortgage mentioned in the said indenture of lease in the said declaration mentioned (the said moneys amounting together to a large sum of money, to wit, 1500l.), by and out of certain moneys arising from the absolute sale of part of the *hereditaments and premises comprised in the said indenture of mortgage [*155

and assignment, and, when paid to and received by the said J. E. S., equal to the amount of the said principal and interest, and amounting to a large sum of money, to wit, 1500*l*. And the defendant further saith that afterwards, to wit, on the day and year last aforesaid, by an indenture then made between the said B. Yeoman of the first part, the said J. E. Salmon of the second part, the said R. Blunt, in the declaration mentioned, of the third part, and Shadrach Clement of the fourth part, which same indenture was then sealed with the respective seals of the said J. E. Salmon and the said B. Yeoman, and by them then was severally and respectively delivered as and being their act and deed (which said indenture being the property of the said R. Blunt, and not in the possession of the defendant, the defendant cannot bring the same into Court), the said J. E. Salmon did acknowledge that the said J. E. S. had been paid the whole of the principal and interest moneys due to him on the said mortgage or security so made to him as therein aforesaid, by and out of moneys arising from the sale of part of the hereditaments and premises therein comprised, and that all principal and interest moneys due and owing to the said J. E. S. upon or by virtue of the same indenture of assignment and mortgage had been paid off and discharged; and did thereby acquit, release and discharge the said B. Yeoman from all claims and demands of the said J. E. Salmon under or by virtue of the said mortgage." Verification.

Demurrer, assigning for causes, among others: That the plea does not sufficiently traverse, or confess and avoid. That it does not specify *156] a time in respect of *which the rent to which the defence applies became due, or when, with reference to such time, the defence arose. That it does not show in direct terms that the premises had been redeemed, and that a due and legal termination had been put to the recited mortgage. That it is consistent with every allegation in the plea that such mortgage is still continuing, and that J. E. Salmon had a subsisting claim or lien arising out of and by virtue of the said mortgage, if only in respect of costs, charges, and expenses incidental to the said mortgage and sale alleged in the plea. That the plea shows nothing more than a bare payment of principal money and interest. That the said plea is double by first stating a payment of principal money and interest to J. E. Salmon, and then an alleged acknowledgment by the said J. E. S., under the indenture in the said plea in that behalf mentioned, of all principal money and interest due under the said mortgage deed. That the said plea does not show by whom the said principal money and interest so alleged to have been paid were in fact paid. That it is moreover consistent with every allegation in the plea, that the said mortgage had been and was, before such payment in satisfaction of the principal money and interest in the said plea mentioned, transferred to a third party who has now a subsisting estate and interest thereunder. That the alleged deed of release is pleaded ambiguously, and the operative

parts ought to have been set out. That, if defendant means to rely simply on the alleged acknowledgment by the said J. E. S., limited as it is to the principal money and interest, there is nothing on the face of the plea to show that such simple acknowledgment operated to *dis-charge the said B. Yeoman from all claims and demands under [*157 the said mortgage. That, if, by the term "thereby," the defendant means to refer to the last-mentioned deed itself, independently of the said alleged acknowledgment, the same plea is further double in relying as well upon the said alleged acknowledgment as upon the intrinsic force and operation of that deed. And that the plea does not show any re-conveyance of the mortgaged premises, which it ought to have done, the rent being incident to the reversion. Joinder in demurrer.

The defendant, in his points for argument, stated the following objections to the declaration.

"That the action should have been brought in the names of both covenantees" (mortgagor and mortgagee).

"That, as the plaintiff is entitled to the rent in question during the continuance of the mortgage only, the continuance of such mortgage should have been alleged in the declaration."

"That the declaration does not allege that the rent fell due after the plaintiff became assignee of the residue of the 5000 years' term."

The demurrer was argued in Hilary term and vacation, 1846,(a) by *F. Robinson*, for the plaintiff, and *Peacock* for the defendant. The judgment of this Court, and the subsequent discussion of all the points in the Exchequer Chamber (*Whitaker v. Harold*, p. 168, post), make it unnecessary to report the present argument. The *authorities [*158 referred to, and not cited in the judgment of this Court, or in the Exchequer Chamber, were:

As to the plea: *Com. Dig. Pleader* (E 2), (as showing that a double plea is bad though one of the defences be ill pleaded); *Sacheverell v. Frogatt*, 2 Saund. 367, 371.

As to the declaration: First point; *Foley v. Addenbrooke*, 4 Q. B. 197, *Hopkinson v. Lee*, 6 Q. B. 964, *Slingsby's Case*, 5 Rep. 18 b, *Lord Southampton v. Brown*, 6 B. & C. 718, *Co. Litt.* 213 a, b, *Mills v. Ladbroke*, 7 Man. & G. 218, *Webb v. Russell*, 8 T. R. 398, *Stokes v. Russell*, 8 T. R. 678.(b) [*PATTESON, J.*, mentioned, on this point, *Wakefield v. Brown*, 9 Q. B. 209, then depending.] Second point; *Stark. Ev.* 987 (8d ed.), 6 Bac. Abr. 197 *et seq.* (7th ed.) tit. *Pleas and Pleadings* (B) 5, § 2, *Com. Dig. Pleader* (C 51), (C 57), (C 66). Third point; *Skinner v. Lambert*, 4 Man. & G. 477, 501: precedents in *Lil. Entr.* 125, 137 (*Ashurst v. Mingar*), 2 Mod. Ent. 18, 19 (*Brook v. Jowett*), 3 Wentw. Prec. 478. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

(a) January 27th, before Lord DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, J.; and February 16th, before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, J.

(b) Judgment affirmed in Exch. Ch., *Russell v. Stokes*, 1 H. Bl. 562.

This was an action of covenant for rent under a demise by indenture, by which James Eyre Salmon, being mortgagee of, amongst others, the premises for which rent is now claimed, at the request of Benjamin Yeoman the mortgagor, demised, and Yeoman also demised and confirmed, *159] to Robert Lee (whose assignee the defendant *is), for 4000 years, at a yearly rent of 18*l.* 18*s.* The words of the reddendum are "Yielding," &c. (His Lordship read the clause, as set forth, *antè*, p. 149.) The covenant on which the declaration is framed is in these words: "And the said Robert Lee," &c. His Lordship read the covenant as set forth, *antè*, p. 150.) The interest of Yeoman the mortgagor appeared to be a term of 5000 years, the whole of which he had assigned to Salmon by way of mortgage, prior to the making of the lease to Lee. The plaintiff traced title from Salmon by deeds, to which Yeoman's name appears as a party; but the declaration does not aver that any one of them was executed by Yeoman. This is material, because, if the plaintiff had traced title both from Yeoman and Salmon, the question in the cause might have assumed a different shape: but, by tracing only from Salmon, he undoubtedly puts himself in the situation of assignee of the mortgage only. There is no averment in the declaration that the mortgage was continuing at the time when the rent sued for accrued. The declaration then alleges that, after the making of the indenture of lease, and during the term of 4000 years, and after the defendant became assignee, and while he continued assignee, and before the commencement of this suit, two years' rent became and was, and still is, in arrear and unpaid to the plaintiff; but it does not aver in terms that it became in arrear after the plaintiff became assignee of the reversion.

The defendant pleaded that, before any part of the said arrears of rent became due, and after the making of the indenture of demise, and during the continuance of the mortgage, Salmon was paid and satisfied *160] all the principal moneys and interest due to him by virtue of *the mortgage, out of moneys arising from the absolute sale of part of the demised premises, and, afterwards, by indenture executed by him, acknowledged himself to be so paid and satisfied, and acquitted, released, and discharged Yeoman from all claims in respect thereof.

Several objections are taken to this plea. First: That it does not show that the mortgage is not continuing, but only that the mortgage money has been paid. Now this objection depends on the meaning to be given to the words "during the continuance of the said hereinbefore recited mortgage, and, after payment and satisfaction thereof," in the reddendum. Those words plainly show that the rent was to be paid to Yeoman, not upon reassignment of the term and the putting an end to the mortgage security, but upon the payment and satisfaction of the money secured by the mortgage; and by the words "during the continuance of the mortgage" is plainly meant "the continuance of the mortgage debt." Now the plea distinctly states the payment and satis-

faction of the mortgage money before the rent sued for accrued ; which sufficiently shows that the rent was no longer payable to the mortgagee ; in which case he certainly could not have sued alone, if at all.

The second objection to the plea is that it is double : and this seems to us to be fatal. The payment of the mortgage money, and the execution of a deed by the mortgagee releasing the mortgagor, are plainly two different things, and either would be sufficient to show that the mortgage no longer continued. If the plaintiff by his replication were to deny the payment, he would leave the release unanswered, which would have put an end to the mortgage debt even if not paid ; and, on the *other hand, if he denies the deed of release, he leaves the payment of [*161 the money unanswered.

The plea therefore cannot be sustained, duplicity being one of the causes of demurrer set forth. But it is said that the declaration is bad, and that on several grounds.

First, it is objected that the action should have been brought jointly by the mortgagee and mortgagor. Now, the mortgagor having parted with all his legal interest, and having only the equity of redemption, nothing would pass from him to the lessee ; and it can hardly be said that he confirms the lease. Still the reddendum makes the rent payable severally at one time to the mortgagee, at another to the mortgagor ; and the covenant is capable of being read as several. The Court, therefore, must construe the covenant according to the interest, and according to the apparent meaning of the covenant itself ; and this is in accordance with all the cases which will be found collected in the note to *Eccleston v. Clipsham*, 1 Wms. Saund. 155, a, note (c) (6th ed.) ; (a) adding to them *Bradburne v. Botfield*, 14 M. & W. 559.

Secondly, it is objected that the declaration ought to have averred the continuance of the mortgage. This objection arises on general demurrer ; and there is an averment in the declaration that the plaintiff became and was and is possessed of the entirety of the said demised premises for all the residue and remainder of the said term of 5000 years. This is probably a sufficient averment, by implication, of the continuance of the mortgage term, if any such averment were *necessary ; [*162 *Fryer v. Coombs*, 11 A. & E. 408, and the cases in the notes to *Thursby v. Plant*, 1 Wms. Saund. 235 : (b) but in truth no such averment is necessary, as regards a term of years which is certain and definite. The objection, however, here is that the continuance of the mortgage is not averred ; by which we understand the continuance of the mortgage *debt*. There is nothing in the declaration which supplies the want of this averment by implication ; for the mortgage term may well continue after the mortgage money has been paid. The question, therefore, is whether the payment of the mortgage money, by which the con-

(a) And see p. 154, note (a).

(b) Note (8), and note (k), 6th ed.

tinuance of the mortgage would be determined, is to be considered as a condition subsequent, and in defeasance of the right in the mortgages to receive the rent, within the late case in the Court of Exchequer of *Brooke v. Spong*, 15 M. & W. 153; and we think that it is to be so considered, and it was not necessary that the continuance of the mortgage should be averred in the declaration.

The third objection was that it does not appear by the declaration that the rent sued for accrued after the plaintiff became assignee of the reversion. Whatever force there might be in this objection if pointed out as a ground of special demurrer, we are of opinion that on general demurrer the averment that the rent became due to the *plaintiff* is sufficient.

Upon the whole, therefore, we are of opinion that judgment must be given for the plaintiff. Judgment for plaintiff.

*163] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

WHITAKER v. HARROLD. Dec. 3, 1847.

For syllabus, see *Harrold v. Whitaker*, ante, p. 147.

ERROR was brought in the Exchequer Chamber, upon the judgment in the preceding case. The only error specially assigned was that the declaration was not sufficient in law. Joinder in error.

The case was argued in Trinity vacation last (June 15th and 23d), before WILDE, C. J., COLTMAN, MAULE, and CRESSWELL, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.

Peacock, for the plaintiff in error (defendant below). First: the plea is good. The principal grounds of demurrer to the plea are that it does not confess and avoid; that it is double; and that it does not show that the mortgage has been redeemed. But the plea does confess that the rent claimed is in arrear, and avoids this by showing that it is no longer payable to the plaintiff.

The plea is said to be double, because it alleges the payment of the mortgage debt, and also a release to the mortgagor of all claims in respect of it. But, where an obligation to pay money arises by covenant in a deed, payment after the day without acquittance by deed is no answer; *Blake's Case*, 6 Rep. 43 b; the whole plea, therefore, offers but one defence. The objection, that the plea does not show that the mortgage has been redeemed, *probably means no more than that

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the plea does not state a reconveyance of the mortgaged premises.

It is necessary, therefore, to consider the meaning of the *reddendum*. The rent is reserved to the mortgagee, "his executors, administrators, and assigns, during the continuance of the said hereinbefore recited mortgage, and, after payment and satisfaction thereof," to the mortgagor; and the covenant is with both mortgagee and mortgagor to pay the rent accordingly. The plea alleges that before the rent in question accrued the mortgagee was "paid and satisfied all the principal moneys and interest due to him" "under or by virtue of the said mortgage." It will be said that the mortgage would continue until reconveyance to the mortgagor, and, consequently, that the rent is still payable to the mortgagee and his assigns. But, if this be the meaning of the *reddendum*, the express reservation to the mortgagor was unnecessary, for on reconveyance he would at once be entitled to the rent under the prior reservation to the mortgagee's "assigns." The meaning, therefore, must be that the rent was to be paid to the mortgagee so long only as the mortgage debt should be unpaid. [PARKE, B. The plea does not state by whom the payment was made; and, if the release is relied upon, the plea does not precisely state when it was executed: it might have been just before plea.] "Where a sum, a time, or any matter is material, the sum, the time, or matter, though mentioned under a *videlicet*, shall be taken to be the true sum, the true time, or the true matter;" *Nightingale v. Wilcoxon*, 10 B. & C. 202, 215. The doctrine on this subject is explained also by *Ring v. Roxbrough*, 2 C. & J. 418, S. C. 2 Tyrwh. 468, note (1), to **Dakin's Case*, 2 Wms. Saund. 290, c. (6th ed.), *Hague v. French*, 3 B. & P. 173, and *Giles v. Bourne*, 6 M. & S. [*165 73. In *Down v. Hatcher*, 10 A. & E. 121, a plea that 6*l.* 10*s.* was paid and accepted in satisfaction of a residue, stated in the declaration to be, to wit, "the sum of 500*l.*," was held bad after verdict for the defendants. The dates alleged in the present plea, therefore, must be taken to be true; and it is also alleged that the mortgage debt was satisfied before the rent became due, and after the lease and mortgage.

Secondly. If the rent was payable to the mortgagee and his assigns until reconveyance, then certainly the plea is bad. But the declaration is also bad. The covenant is with both mortgagor and mortgagee, and is a joint covenant in gross, because the mortgagor had no interest. The mortgagor, therefore, should have been a party to this action. A covenant is not several unless the covenantees have several interests; *Sorsbie v. Park*, 12 M. & W. 146, *Bradburne v. Botfield*, 14 M. & W. 559. Again, the declaration does not show that the rent became due after the plaintiff became assignee of the reversion, unless the dates are material, and to be taken as true. The allegation that the rent became in arrear and unpaid to the plaintiff is not enough; *Fryer v. Coombs*, 11 A. & E. 403. Lastly, the declaration is bad for not averring the continuance of the mortgage. The mere presumption of continuance cannot be relied upon. The presumption of law is that every person once living con-

tinues to live, yet wherever title depends upon continuance of life, such
 *166] continuance must be averred; *Fryer v. Coombs* is an authority
 on this point also: and, *indeed, the continuance of every particular estate must be shown.

Butt, for the defendant in error (plaintiff below). The declaration is good, and the action rightly brought by the plaintiff alone. The construction that the rent is payable to the mortgagee so long only as the mortgage debt remains unpaid, does violence to the language of the *reddendum*, and makes the rent separable from the reversion. A mortgage signifies not merely a loan but a conveyance; and a covenant to pay rent during the continuance of a mortgage is in force until reconveyance. Rent paid to the mortgagee under such a covenant, after satisfaction of the mortgage debt, would be received by him as trustee for the mortgagor. At no period does the covenant in question give a joint action to the mortgagor and mortgagee; for the rent is payable to the mortgagee alone until reconveyance, and to the mortgagor alone afterwards, so that each has a distinct interest from the other. In *Bradburne v. Botfield*, 14 M. & W. 559, there was not only a joint covenant, but the covenantees had a joint interest. So in *Martindale v. Anderson*, 1 East, 497, there was a joint covenant to two to pay a single annuity to one; and the covenant applied to one subject-matter and one person during the whole time of its operation. The present case is like *Withers v. Bircham*, 3 B. & C. 254, where the covenant was with two to pay distinct annuities to each. The next objection is that the declaration does not allege the rent to have become payable after the assignment to the plaintiff. The statement that the rent became in arrear to *167] the *plaintiff is sufficient on general demurrer. [MAULE, J. There is a statement that the rent became in arrear to the plaintiff on the 25th March, 1844, for two years "then last elapsed;" so that, if the dates are material, there is an express statement that it became in arrear after the plaintiff had acquired title to it.] Lastly, it was not necessary for the plaintiff to show the continuance of the mortgage. *Fryer v. Coombs*, 11 A. & E. 403, *Dayrell v. Hoare*, 12 A. & E. 356, and similar cases, applying to estates of uncertain duration in their own nature, are not in point; and, even as to these estates, it seems that, where title is derived from a tenant for life, it is sufficient, on general demurrer, if it appears by implication that the life continues; note (8) to *Thursby v. Plant*, 1 Wms. Saund. 235 b, (6th ed.) (a) The distinction is between a certain particular estate, such as a term of years in the present case, and an uncertain particular estate. The satisfaction of the mortgage here was matter of defeasance or condition subsequent: and it is clear that such matter need not be negatived, but must be averred by the other side; *Brooke v. Spong*, 15 M. & W. 153, *The Attorney-General v. Buckeridge*, Hardr. 75, 79, 82.

(a) And see the judgment of *Fryer v. Coombs*, 11 A. & E. 403, 410.

Secondly. The plea is bad. The principal objections to it are: That it does not show that the payment and release were before the rent became due: That it does not give the particulars of the payment,^(a) or show a reconveyance of the estate; so that it is consistent with the alleged payment that the mortgagee may have assigned the mortgage in consideration of the *alleged payment, and that the mortgage is still in force, and also that the plea is double. [WILDE, C. J. [*168 The plea attempts to defeat the plaintiff by a statement of transactions between the mortgagor and mortgagee which may be subsequently to the time when the plaintiff acquired his interest.]

Peacock, in reply. The "satisfaction" of a mortgage is treated as a distinct matter from reconveyance of the mortgaged premises in stat. 7 G. 2, c. 20, s. 1. The continuance of the mortgage should have been averred by the plaintiff; for it is within his knowledge, and not the defendant's. [PARKE, B. If an annuity is granted to a clerk until he be promoted to a benefice, it is not necessary for him in suing for his annuity to negative promotion to a benefice; yet that would be peculiarly within his knowledge. WILDE, C. J. The difficulty of the plaintiff below is, that he does not show title to the rent, unless the dates are material.] If the dates in the declaration are material, they are equally so in the plea. The judgment, however, is erroneous if the dates in the declaration are material, for at the alleged date of 25th March, 1844, there could not have been more than half a year's rent due in respect of that moiety which came to the plaintiff on 15th December, 1843; yet the plaintiff has had judgment for two years' rent in respect of it. [MAULE, J. The Court which has awarded the damages may reform that.] *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the Court. His Lordship first read the material parts of the declaration, observing that, "Although several of *the indentures set forth state Yeoman the original [*169 mortgagor to be a party to them, it does not appear that he executed any of them." He also stated the substance of the plea, and then proceeded as follows.

To this plea the plaintiff specially demurred, assigning, among many other causes, that the plea is double, by first stating a payment to Salmon, and then an alleged acknowledgment and release by him of the mortgage debt and interest; and the demurrer also assigns for cause that the mode in which the deed was pleaded is uncertain and ambiguous.

It seems that, upon the argument in the Court of Queen's Bench, the then defendant and now plaintiff in error contended that the plea was good, and also insisted that the declaration was bad on various grounds. The Court of Queen's Bench held the plea to be double and bad, and the declaration to be good, and gave judgment for the plaintiff. Where-

(a) It was observed in the Court below that no payment of costs was alleged.

upon a writ of error was brought in this Court : and the same was argued before us, on the 23d of June last.

On the argument of the writ of error before us it was contended, on the part of the plaintiff in error, that the judgment of the Court of Queen's Bench was erroneous in holding the plea to be bad on the ground of its being double ; and that it was not bad in any other respect. Secondly, That, if the plea were bad, the declaration was bad in substance.

We are of opinion that the plea is bad, and the declaration good : and consequently the judgment of the Court of Queen's Bench must be affirmed.

As to the plea, the Court of Queen's Bench held that it was double, and that such duplicity was well pointed out as cause of special demurrer. *170] The duplicity *consists in relying first on the payment of the mortgage as matter in pais, and then on the release of the mortgage debt ; and this duplicity is pointed out among the causes of special demurrer. But for the plaintiff in error it was argued that the payment without a release was insufficient, and that therefore, the debt being due by specialty, the payment and release together constituted complete *payment*. The foundation of this argument was that the mortgage debt was covenanted in the indenture of mortgage to be paid on a day certain ; or at least covenanted to be paid. But it is a sufficient answer to this argument that on the pleadings it does not appear, and it cannot be assumed, that there was a covenant to pay the mortgage debt on any certain day or at any time ; and therefore there is an entire absence of the supposed foundation of the argument ; and we are of opinion that the Court of Queen's Bench rightly held the plea double, and therefore bad. Further, we think that, if the plea were not bad for duplicity, it is bad for *not* showing distinctly that the original mortgage debt was discharged and the estate exonerated therefrom. It is consistent with the plea that Salmon may have assigned the mortgage to another, and been paid by the assignee the amount of it in consideration of the assignment, and that the payment may have been made by the assignee, by selling a portion of the estate which might have been purchased by him : and, besides, the release may have been made by Salmon *after the assignment* to Seymour, when it could have no effect on Seymour's vested interest, which could only be defeated by the actual payment of the mortgage, not by its release ; for he was entitled to the rent till *payment* and *171] *satisfaction* of the mortgage in point of fact, not until Salmon should release it.

For these reasons we think the plea bad.

On the part of the plaintiff in error it was then contended that the declaration was bad for three reasons. First, that the covenant to pay the rent was a covenant in gross. Secondly, that the continuance of the mortgage was not averred. Thirdly, that it did not appear that the

rent sued for became due after the assignment of the reversion to the plaintiff. We agree with the Court of Queen's Bench in the construction of the covenant, and think it is a covenant to pay to the lessor and his assigns until payment and satisfaction of the mortgage debt; for the covenant runs with the land, and does not become a covenant in gross, until that event happens. Secondly, we think that, as the estate in the reversion, and the right to sue on the covenant, commenced on the execution of the lease, the payment of the mortgage money was a condition subsequent, operating in defeasance of the covenant, and should therefore have been pleaded by the defendant; *Brooke v. Spong*, 15 M. & W. 153. The declaration, therefore, is in this respect sufficient. The last objection was, that it did not appear that the rent became due *after* the assignment to the plaintiff. The Court of Queen's Bench held that the averment of its being due and in arrear to *the plaintiff* was sufficient on general demurrer. The judgment of *PATTERSON, J.*, in the case of *Fryer v. Coombs*, 11 A. & E. 403, 408, raises a doubt whether it was so; but, if it was not, the declaration may be supported on the ground upon which the counsel *for the plaintiff in error relied in answer [172 to one of the objections to the plea, viz., that dates, when material, though laid under a *videlicet*, are on demurrer to be assumed to be correct; and the dates of the assignments of the two moieties of the premises to the plaintiff may therefore be taken to be the true dates, though under a *videlicet*, if they are essential to the plaintiff's case, according to the doctrine of *BAYLEY, J.*, in the case of *Nightingale v. Wilcoxson*, 10 B. & C. 202, 215. Assuming the dates to be correct, the assignment of one moiety was made by Seymour to the plaintiff on the 18th February, 1835, and the other on the 15th December, 1843. The rent was payable on the 29th September and the 25th March; and two years were due, ending on the 25th March, 1844, which is a material date, and must be assumed to be true on demurrer; so that the plaintiff was, on the supposition of the truth of the dates, entitled to half a year's entire rent on the 25th March, 1844, and a moiety of the remaining year and a half. It may be that, on this supposition, the Court of Queen's Bench, which may assess damages on a demurrer or judgment by default without the intervention of a jury, have awarded too much damage; but this, being a matter in the discretion of the Court, cannot be inquired into on a writ of error. This objection therefore cannot prevail: and the judgment of the Court of Queen's Bench must be affirmed.

Judgment affirmed.(a)

(a) The case in the Exchequer Chamber is reported by H. Davison, Esq.

*173] *The QUEEN v. JAMES CHADWICK.

(In Error.)

The QUEEN v. The Inhabitants of ST. GILES IN THE FIELDS.

(ST. GILES IN THE FIELDS v. ST. MARY, LAMBETH.)

Stat. 5 & 6 W. 4, c. 54, s. 2 (passed 31st August, 1825), enacts that all marriages which shall thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be null and void.

The prohibited degrees are those declared by stat. 28 H. 8, c. 7, s. 11, to be prohibited by God's law.

Consequently, the marriage of a man with the sister of his deceased wife is prohibited, and void by stat. 5 & 6 W. 4, c. 54.

This law extends to an illegitimate as well as to a legitimate child of the late wife's parents.

THE case of Regina v. St. Giles in the Fields was stated and argued as follows.(a)

On appeal against an order of a police magistrate of the metropolis for the removal of paupers described in the order as "Mary Burrin, the widow of William Burrin, deceased, and her lawful child by her said late husband, namely, Emily, born on or about," &c., from the parish of Lambeth, in Surrey, to the parish of St. Giles in the Fields, in Middlesex, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The pauper Mary was born in 1804, and is the illegitimate child of Mary Harris, then a spinster. The said Mary Harris cohabited before marriage with John Gilloe: and the said pauper Mary is the illegitimate *174] daughter of the said Mary Harris, born during *such cohabitation. The said pauper Mary was married in all respects legally (except as to the question now submitted to the consideration of this Court) to the said William Burrin, on the 19th November, 1837. Of this marriage the pauper Emily (born on 21st November, 1843) is the issue. The said John Gilloe and Mary Harris, after the birth of the said pauper Mary, viz. in the month of April, 1811, intermarried, and had issue a legitimate daughter Hannah Gilloe, born after the marriage, viz. in October, 1811, which Hannah, on 16th January, 1831, intermarried with the said William Burrin, and departed this life before his said marriage with the said pauper Mary, viz. on 29th May, 1837. The said William Burrin died on 5th November, 1844: and his last legal settlement was in the appellant parish.

The question for the opinion of this Court is: Whether the said alleged marriage of the said William Burrin with the said pauper Mary was celebrated between persons within the prohibited degrees of affinity, and is not therefore null and void? If this Court shall be of opinion

(a) These cases are placed in the order in which they were decided; but the arguments are reported in the order in which they took place.

that such alleged marriage is null and void, the order of the said Court of Quarter Sessions, and the order of removal, are to be quashed and the appeal allowed. If this Court shall be of opinion that such alleged marriage is valid, the order of the said Court of Quarter Sessions is to be affirmed.

This case was argued in Trinity vacation, 1847.(a)

Placock, Knapp, and T. Campbell Foster, in support of the order of sessions. The marriage of the pauper, *Mary, with William Burrin, took place after the passing of stat. 5 & 6 W. 4, c. 54, [*175 "to render certain marriages valid, and to alter the law with respect to certain voidable marriages." That statute enacts (sect. 1) that "all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act:" and, by sect. 2, "that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." The questions which arise on the present occasion therefore are, Whether the marriage with a deceased wife's sister, generally, is within "the prohibited degrees of affinity:" and, if so, Whether this is the case when the second wife is the illegitimate sister of the first.

It is therefore to be determined, what are the "prohibited degrees of affinity?" and, first, whether marriage with a wife's sister is prohibited by the statute law. This turns in the first place on stat. 32 H. 8, c. 38; which recites that the usurped power of the Bishop of Rome had much unquieted the subjects of the realm of England, "as by making that unlawful which by God's word is lawful, both in marriages and other things:" That on this account it was thought convenient by Parliament to provide specially for two things: 1. The case of marriages dissolved by the bishop of Rome on pretence of former contract: 2. Also of marriages dissolved "by reason of other prohibitions *than God's law [*176 admitteth, for their lucre by that Court invented, the dispensations whereof they always reserved to themselves, as in kindred or affinity between cousin-germans, and so to fourth and fourth degree, carnal knowledge of any of the same kin, or affinity before in such outward degrees, which else were lawful, and be not prohibited by God's law." It then (sect. 2) proceeds to enact that, from and after the 1st July next coming (A. D. 1540), "all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry), such marriages being contract and solemnized in the face of the Church, and consummate," &c., "shall be by authority

(a) June 14th, 15th, and 30th. Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and ERLE, Ja.

of this present parliament aforesaid deemed, judged, and taken to be lawful, good, just, and indissoluble," notwithstanding any precontract of matrimony not consummate, dispensation, &c., "and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." Finally, that no person shall be admitted in the Spiritual Courts to process, plea, or allegation, contrary to this act.

So much of this statute as related to precontracts was repealed by the statute 2 & 8 Edw. 6, c. 23, s. 2. And by stat. 1 & 2 Ph. & M. c. 8, entitled "An act repealing all articles and provisions made against the see apostolic of Rome, since the 20th year of King Henry the VIIIth," the whole of stat. 32 H. 8, c. 38, is repealed (sect. 19). But by stat. 1 Eliz. c. 1, ss. 11, 12, it is enacted "That so much of" stat. 32 H. 8, c. 38, "as in the time of the late king Edward the VIth" *177] "was not repealed," may from henceforth "stand and be revived." The result therefore is, that so much of stat. 32 H. 8, c. 38, as applies to the present case is still in force; and the marriages forbidden by it are such as are "prohibited by God's law," and those only.

But, to determine what marriages are "prohibited by God's law" according to legal interpretation, it is necessary to consider the effect of certain nearly contemporary statutes which have been thought to bear on the question. Stat. 25 H. 8, c. 22 (sect. 2), annuls King Henry VIII's marriage with Queen Katharine, and affirms that with Anne Boleyn. This statute, entitled "An Act concerning the King's succession," recites (sect. 3) the marriages "prohibited and detested by the laws of God," and among them the marriage of a man with his wife's sister; and enacts (sect. 4) that no person may marry within the said degrees, and that any separation by the archbishops, &c., of parties so married shall be valid. This statute was expressly repealed (according to the judgment of VAUGHAN, C. J., in *Hill v. Good*, Vaughan, 302, 323, (a)) by stat. 28 H. 8, c. 7, which, on the marriage of Henry VIII with Jane Seymour, re-enacted (sect. 9) the nullity of the King's marriage with the Lady Katharine, and annulled (sect. 10) also his marriage with Anne Boleyn. This last statute proceeds (sect. 11) to recite prohibited marriages in nearly the same words as stat. 25 H. 8, c. 22, s. 3, extending the application of this recital (by sect. 12) to the case of consanguinity or affinity to persons carnally known without marriage; and, *178] by sect. 13, it re-enacts the prohibitions of stat. 25 H. 8, c. 22, s. 4, almost verbatim. But in the same session another act passed (28 H. 8, c. 16), which, by sect. 2, made bulls and dispensations by the pope to persons in the King's dominions void; and enacted that all marriages made before 3d November, 26 H. 8 (1534), whereof there was no divorce or separation had, "and which marriages be not prohibited by God's laws, limited and declared in the act made in this present par-

(a) See sect. 2. And see Chitty's statutes, Vol. I., Part 2, p. 711, note (b).

liament for the establishment of the King's succession, or otherwise by Holy Scripture," shall be good and lawful. This statute, it will be observed, does not re-enact the prohibitions of stat. 28 H. 8, c. 7: these were then in force: it merely declares that marriages not contrary to that act shall be lawful.

But, on the accession of Mary, the act 2 stat. 1 Mary, c. 1, was passed to validate her mother Katharine's marriage with Hen. VIII. This act (sect. 8) expressly repeals the whole of stat. 25 H. 8, c. 22, and so much of stat. 28 H. 8, c. 7, or "any other act" whereby the marriage in question is declared to be against the word of God or unlawful: rendering them "void, and of no force, nor effect, to all intents, constructions, and purposes, as if the same" "had never been had ne made." And it enacts that the marriage in question (which was with a deceased brother's widow) be "adjudged to be, and stand with God's law."

By stat. 1 & 2 Ph. & M. c. 8, already referred to, sect. 17, all that part of stat. 28 H. 8, c. 7, "that concerneth a prohibition to marry within the degrees expressed in the said act," was again expressly repealed.

Lastly, stat. 1 Eliz. c. 1, already cited (which revives a portion of stat. 32 H. 8, c. 38), does not revive either stat. 25 H. 8, c. 22, or stat. 28 H. 8, c. 7; but *it does revive stat. 28 H. 8, c. 16. There- [*179
fore the only subsisting statute affecting the question, prior to
stat. 32 H. 8, is stat. 28 H. 8, c. 16. That statute, as has been already said, enacts no prohibitions, but simply declares that marriages not prohibited by God's law, declared in stat. 28 H. 8, c. 7, which was then in force, are valid. Those prohibitions having ceased by repeal of the last-mentioned act, stat. 28 H. 8 c. 16 seems to be now quite beside the question; and it is unfairly urged by VAUGHAN, C. J., in *Hill v. Good, Vaughan*, 325, that the statute of 28 H. 8, c. 7, was revived by the reviver of stat. 26 H. 8, c. 16.

But again: the same learned Judge argues(a) that "the act of 1 & 2 Ph. & M. c. 8, doth not repeal this act entirely of 28 H. 8, c. 7, but repeals only one clause of it;" namely, the thirteenth. But the prior "clause," namely, sect. 11, which VAUGHAN, C. J., here asserts to be unrepealed, is a mere recital. It declares that "many inconveniences have fallen" "by reason of marrying within the degrees of marriage, prohibited by God's laws, that is to say," the marriage with a wife's sister, among others. The enacting part, sects. 12, 13, which follows, is unquestionably repealed. But the recitals of a statute are not binding upon Courts of law, except for the purpose of construing the particular act in which they are contained. A recital standing alone can have no force.

It follows that, by the statutes which were in existence when stat. 5 & 6 W. 4, c. 54, passed, all marriages were lawful which were not pro-

(a) *Vaughan*, 327.

hibited, according to stat. 32 H. 8, c. 38, s. 2, "by God's law." But
 *180] under *the same statute of H. 8, as interpreted by the Courts of
 Common Law, these Courts had no power to prohibit the Eccle-
 siastical Courts from determining upon questions of marriage, unless it
 was in the case where the marriage was "without the Levitical degrees."
 Supposing, therefore, a marriage could be shown to be "within the
 Levitical degrees," though not prohibited "by God's law," then, although
 such marriage would be valid within the first part of the statute, yet, if
 the Ecclesiastical Courts were to proceed to set it aside as "within the
 Levitical degrees," the Common law Courts would not interfere. This
 was the substantial question decided in *Hill v. Good, Vaughan*, 302.
 And upon this foundation the law rested till the passing of stat. 5 & 6
 W. 4, c. 54. But that act entirely altered the case. The Court must
 now determine, not only whether a marriage is within or without the
 Levitical degrees, but whether it is within or without the prohibition of
 "God's law" also.

VAUGHAN, C. J., in *Hill v. Good, Vaughan*, 305 (wrongly, as the
 respondents say), affirmed "this marriage" (with a wife's sister) "to be
 expressly prohibited within the 18th of Leviticus;" in which case "it
 must be within the Levitical degrees." But, he added, "If it were not
 so prohibited, yet it is not a marriage without the Levitical degrees, but
 within them, and therefore no prohibition will lie for impeaching it; for
 marriages not to be impeached must be without the degrees, and for that
 some marriages within the degrees may be lawful." Now the decision
 of the second point only was sufficient for the purpose of the judgment
 in *Hill v. Good*. Whether the Ecclesiastical Court was right or wrong
 *181] in pronouncing such a marriage invalid, it was plain, on the *con-
 struction given to stat. 32 H. 8, c. 38, s. 2, that no prohibition
 would lie, if the marriage were within the Levitical degrees. The rest
 of the judgment in that case, in which VAUGHAN, C. J., argues with much
 learning that such a marriage, if not within the prohibitions of the 18th
 chapter of Leviticus, is yet "prohibited by God's law," may be regarded
 as having no authority but that of an argument, and not of a decision
 on the point now in issue.

Nor does any other decided case contain the judgment of a Court of
 common law to the effect that such a marriage is invalid. In *Harrison*
v. Dr. Burwell, Vaughan, 206 (decided before *Hill v. Good, Vaughan*,
 302), a prohibition went in a case of marriage with a great-uncle's widow:
 which, therefore, was held not to be prohibited by the law of God. In
Manue's Case, Moore, 907, S. C. Cro. Eliz. 228, it should seem that a
 consultation was granted; but, notwithstanding the criticism of VAU-
 GHAN, C. J.,(a) on the report of that case in Croke, it does not appear
 that the Court expressed any opinion that marriage with a wife's niece
 was prohibited "by God's law." VAUGHAN, C. J., proceeds to say:(a)

(a) *Hill v. Good, Vaughan*, 321, 322.

"Sir Edward Coke, in the first edition of his *Littleton*, saith, that one Pierson was sued in the Ecclesiastical Court for marrying his first wife's sister's daughter against the canons of the church; and that the Court of Common Pleas, upon consideration taken of the statute of 32 H. 8, granted a prohibition, because the marriage was not prohibited by the Levitical degrees. And these two cases have been principally insisted on to prove no marriage is within the Levitical *degrees, if the degree be not particularly mentioned in the eighteenth of Leviticus. But upon occasion of Harrison's case,^(a) lately adjudged in this Court, I made search for the records of these two cases." "By the record of Pierson's case, which was in Trinity, 2 Jac., it appears that in Hilary Term following a consultation was granted, which Sir Edward Coke mentions not in his *Littleton*. And in the second edition of his *Littleton*, and all the subsequent editions, that case is omitted." The fact appears to be, that this passage was omitted in all the editions between the second and the ninth, in which it is restored. In Hargrave and Butler's edition (Co. Lit. 235 a) it stands thus: "A man married the daughter of the sister of his first wife, and was drawn in question in the Ecclesiastical Court for this marriage, alleging the same to be against the canons; and it was resolved by the Court of Common Pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said act of parliament to be good, inasmuch as it was not prohibited by the Levitical degrees." In note 149, on this passage, Mr. Butler says, "This passage exposed Sir Edward Coke to much censure," &c.; and adds, citing Burn's *Eccl. Law*, vol. iii. p. 402, 3d ed.^(b) "There are several degrees, which, although not expressly named in the Levitical law, are yet prohibited by that, and by the statute of 32 H. 8, c. 38, by parity of reason. Hence in the case of *Wortley and Watkinson*, 2 (T.) Jones, 118, S. C. 2 Lev. 254, 3 Keb. 660, a consultation was granted, where one had married the daughter of the sister of his former wife; which (as Sir John King laid the argument) is *the same degree of proximity, as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other by parity of reason is so likewise; as it had been declared E. 16. J. in *Pennington's case*, before the High Commissioners. Which point was again argued T. 1 An. in the case of *Snowling and Nursey*, 2 Lutw. 1075, and consultation granted as before, notwithstanding the case of *Richard Parsons*, mentioned by Lord Coke, 1 Inst. 235, in which it was first determined not to be within the Levitical degrees, and prohibition granted; but a consultation being awarded on debate, two years after, that case is said to have been expunged out of the First Institute, by order of the King and council." "But where in the case of *Harrison and Burwell*, T. 20 C. 2, Vaughan, 206, in the Spiritual court, one had

(a) *Harrison v. Dr. Burwell, Vaughan*, 206.

(b) Vol. 2, p. 447, 9th ed. tit. *Marriage*, l.

married the wife of his great-uncle, this was declared not to be within the Levitical degrees: and accordingly, after the opinion of all the Judges taken by the king's special command, a prohibition was granted." Mr. Butler then adds, from Lord NOTTINGHAM's MS. notes: "Note, the case of Richard Parsons, T. 2 Ja. Ro. 1082, where a man may marry the daughter of his wife's sister, which is in the editions of 1623 and that of 29, and is here left out. See Moore, 1266, Manne's case, 33 Eliz.(a) in (b) the case of the widow of one Rennington, who claimed a widow's estate, but was denied because she was niece to the former wife of Rennington, who had done penance for the incestuous marriage; but it was resolved she should have her widow's estate, because there was never any divorce had in the life of her husband, though there was *184] cause." Lord NOTTINGHAM refers also to "some other authorities noticed in this argument, and to "B. Stillingfleet's Life, p. 121." The opinion in Rennington's case, Hob. 181, was clearly extrajudicial, inasmuch as, no divorce having been granted, the point did not arise: the case, however, is relied on by VAUGHAN, C. J.:(c) but the conclusion which he draws is only that which has been already admitted, viz., that the marriage with a wife's sister's daughter is "within the Levitical degrees:" which, as has been already contended, it may be, and yet valid within the first branch of stat. 32 H. 8, c. 38.

The general result therefore appears to be, that Lord Coke, and others who followed the maxims of the common law, were reluctant to admit the invalidity of marriages of this description; but that the Ecclesiastical Courts persisted in regarding them as invalid because within the Levitical degrees: and that the Courts of common law ultimately came to the conclusion that, if they were within those degrees, they could not prohibit. And this again is consistent with the view of the case taken by VAUGHAN, C. J. "It is not strange," he says, "that at first prohibitions were granted upon the statute of 32, in cases which were not specifically mentioned in the 18th of Leviticus, but after discussions of the Levitical degrees upon consultations prayed, it was manifestly found that divers marriages must be prohibited within the Levitical degrees, not nominally expressed in the 18th of Leviticus."(c)

In the case of *Wortley v. Watkinson*,(d) cited in Mr. Butler's note, *185] it seems doubtful whether the marriage *was with a step-daughter or a wife's sister's daughter; but a prohibition was granted, and consultation refused. *Snowling v. Nursey*, 2 Lutw. 1075, was decided expressly on the ground (which would now be held erroneous) that the marriage there in question (with a wife's sister's daughter) was prohibited

(a) Sic.

(b) Rennington's case. Cited in *Howard v. Bartlet*, Hob. 181, (5th ed.) See *Rennington v. Cole*, Noy's Rep. 29.

(c) *Hill v. Good*, Vaughan, 302, 322.

(d) 2 (T.) Jones, 118; 8 C. 2 Lev. 254 (see the note, p. 255); 3 Keb. 660.

by the 99th canon of 1603. *Butler v. Gastrill*, Gilb. Ca. Eq. 156, S. C. Bunb. 145, merely followed *Hill v. Good*, Vaughan, 302.

The Courts of common law having therefore nowhere expressly recognised the invalidity of these marriages, it becomes necessary to examine, whether, on any other ground, they can be said to be "prohibited by God's law."

The first argument is that which is based on the interpretation of Scripture. The so called "Levitical degrees" are sanctioned by the canons of 1603. Although these degrees are mentioned in stat. 32 H. 8, c. 38, s. 2, yet, legally speaking, there is no authoritative exposition of them in the canons in question. Now the 18th chapter of Leviticus does not in express terms forbid marriage with a wife's sister, or any other marriage with the collateral relations of a wife: while the peculiar prohibition in verse 18 ("neither shalt thou take a wife to her sister, to vex her," "beside the other in her lifetime"), seems to admit, by implication, the lawfulness of such a marriage after the wife's death. This is the interpretation of the chapter adopted by the Jews both in ancient and modern times; Michaelis, *Commentaries on the Laws of Moses*, vol. ii. p. 112 (Smith's translation); Fagius ad locum, *Critici Sacri*, tom. i. p. 822; Calmet's *Comment. in locum*, tom. i. part 1, p. 64; Bishop Kidder's *Commentaries on the Five Books of Moses*, vol. ii. p. 106: and this is *admitted by VAUGHAN, C. J., himself, in *Harrison v. Burwell*, Vaughan, p. 241. It is conceded, for the purpose of [*186 this argument, that the chapter in question relates to marriages, because stat. 32 H. 8, c. 38, s. 2, adopts it in that sense; though it must be added that some Hebrew scholars deny that it has any reference to marriage. It must be conceded, also, that the Levitical law in this respect is binding in England, because it is so recognised by the statute in question.

The remaining argument, suggested from the same chapter, against marriage with a wife's sister, is derived from v. 16, which prohibits that with a brother's widow. This argument by "parity of reason" (a) is dangerous, as well as inconclusive, where it is impossible to judge of the particular ground and reason of a prohibition.

But the opposite conclusion is additionally and strongly justified by the practice of the Jews, among whom such marriages were regarded as lawful, notwithstanding the more severe exposition of these chapters adopted by the Karaites; *Selden, Uxor Ebraica*, lib. 1, ch. 3, 4, 5, 6; *Hill v. Good*, Vaughan, 315: by that of the Roman Catholic Church, which recognises the power of the Pope to grant dispensations permitting them; thereby admitting that the prohibition is one of ecclesiastical authority and discipline only, and not grounded on the law of God: and by that of the legislatures and courts of justice of most Protestant countries; see *Story, On the Conflict of Laws*, ch. v. s. 114—116.

(a) *Reformatio Legum*, fo. 44, &c., *De gradibus in matrimonio prohibendis*, co. 3, 4, 5; 2 Inst. 682.

The argument of VAUGHAN, C. J.,^(a) to the contrary is far too comprehensive; as, if followed to its utmost extent, it would authorize a *187] great number of *prohibitions beyond those contained in the so called Levitical degrees or recognised by any jurisprudence. Consequently it is necessary, on his argument, to call in some other rule besides that of Scripture, to define where the prohibitions in question end. And this constitutes the difficulty of the appellants' case. For no distinct authority can be shown, which so defines and lays down any interpretation, limitation, or extension of the plain words of Scripture, as to be legally binding, so that it can be referred to as expounding "the law of God" in reference to prohibited marriages.

If the prohibition, therefore, rests on ecclesiastical foundations only, the question arises, what authority is to be attributed to those early decisions of councils, and other expressions of the supposed sense of the Church, which are adduced in its favour. Reliance is placed, first, on the so called *Canones Apostolici*:^(b) of which the 18th is "*Qui duas sorores duxit, vel consobrinam, non potest esse clericus.*" But, whatever the historical authority of those canons may be, an ecclesiastical rule, that one who had engaged in such a marriage could not take orders, is no declaration of the Church's sentiment that such marriages are wholly unlawful. Secondly, on the canons of an ancient provincial council, that of *Eliberis* in Spain (16th canon), A. D. 313,^(c) also cited in *Hill v. Good*, Vaughan, 315, by VAUGHAN, C. J., who says, "by this so ancient council, marrying the wives' sister was accounted unlawful but for the same reasons as before; they could punish it no otherwise than by ways in the power of the Church, which was to hinder the *188] offender from *communion for five years." But, when it is found that both the "*Apostolical canons*" and those of *Eliberis* forbid many other things which by the consent of Christian churches and people have been since regarded as lawful (the former, for instance, excluding from orders all who have been twice married, or have married widows, or a woman divorced, &c.; canons 17, 18; the latter containing prohibitions which appear directed against marriage itself in the case of persons ordained; canon 33); it can hardly be contended that they possess any binding force, or represent what must now be taken to be the view of the Christian church. And the same observations apply to the canons of such later councils as may be cited to a similar effect: as that of *Neo-Cæsarea* (A. D. 314^(d)), the *Concilium Agathense* (A. D. 506^(e)), and the *Concilium Romanum* (A. D. 721^(g)).

The only argument in defence of the prohibition, remaining to be noticed, is that arising from ecclesiastical law as recognised in England.

(a) *Hill v. Good*, p. 306—312.

(b) *Hill v. Good*, Vaughan, 312. See Beveridge's *Synodicon*, tom. i. p. 13.

(c) Cap. 61. See Harduin, *Act. Conc.*, tom. i. p. 256.

(d) Harduin, *Act. Conc.*, tom. i. p. 281.

(e) *Ib.* ii. 995 (Agda.)

(g) *Ib.* iii. 1365.

By canon 99 of the Church of England,(a) it is ordained that "no person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year of our Lord 1563, and all marriages so made and contracted, shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated." The table in question, commonly called Archbishop Parker's table, contains the prohibitions against marriages of affinity; 2 Inst. 683; 2 Burn's Eccl. Law, 9th ed. p. 442. And on this foundation rests the jurisdiction so repeatedly exercised by the Ecclesiastical Courts, before the recent statute, in avoiding such marriages. But, for the reasons already stated, that jurisdiction has now ceased; and [*189 the naked question remains, Have these ecclesiastical prohibitions the force of law?

First, as to the canon law generally. In *Regina v. Millis*, 10 Cl. & Fin. 534, 680, TINDAL, C. J., says: "That the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord Hale(b) defines the extent to which it is limited very accurately. 'The rule,' he says (speaking of the Ecclesiastical Courts), 'by which they proceed is the canon law, but not in its full latitude; and only so far as it stands uncorrected, either by contrary acts of parliament, or the common law and custom of England. For there are divers canons made in ancient times, and decretals of the Popes, that never were admitted here in England.'" And Lord COTTENHAM says:(c) "No canon was ever by its own force a part of the law of this country." The discussion there related to canons anterior to the reformation; as to the force of which 2 Inst. 599, 600, and *Matthews v. Burdett*, 2 Salk. 412, 672, 3 Salk. 318, may be referred to.

By stat. 25 H. 8, c. 19, s. 7 (revived by stat. 1 Eliz. c. 1, ss. 6, 10), it was provided, "that such canons," &c., "already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, *searched," &c., by thirty-two persons, whom the act (sect. 2) gave the Crown power to appoint. [*190 This enactment, together with the declaration of stat. 32 H. 8, c. 38, s. 2, that no marriages are prohibited except such as are contrary to the law of God, takes away any force which the canons anterior to the Reformation might have been supposed to possess *proprio vigore*, in relation to incestuous marriages.

As to the canons of the Church of England made since the Reformation, the leading authority is *Middleton v. Crofts*, 2 Atk. 650, S. C. Ca. K. B. Temp. Hard. 57, 326, 2 Str. 1056. The first question in that

(a) 4 Burn's Eccl. L. 659, 9th ed. (Appendix II.)

(b) Hale's Hist. Com. L. c. 2, p. 28 (6th ed.)

(c) 10 Cl. & Fin. 641.

case, as stated by the Court, was, "Whether by virtue of the canons made in the year 1603, lay persons are punishable by ecclesiastical censures for a clandestine marriage, had without banns or license?" This question the Court subdivided into two, the latter being: "If lay persons are within the words of these canons, whether the authority, by which these canons were made, can bind the laity as to this matter?" Upon which the judgment of the Court of King's Bench, as given by Lord HARDWICKE, is: "We are all of opinion, that the canons of 1603, not having been confirmed by Parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from this body of canons." Yet it was upon the supposed binding force and validity of the 99th canon that the case *of

*191] *Hill v. Good, Vaughan*, 302,(a) was mainly decided: and the subsequent cases already cited, resting as they do on *Hill v. Good*, must be considered as wrongly decided if the authority of that case is shaken.

Lastly: assuming the prohibition to be valid, and marriage with a wife's legitimate sister void, the question arises, whether this be so where the sister is illegitimate, and "*nullius filia*." Although, on general principles, this would clearly exclude such a sister from the legal quality and consequences of relationship, reliance will be placed on the authority of *Haines v. Jescott*, 5 Mod. 168, S. C. 1 Ld. Raym. 68. But all that appears in that case is, that the Court "inclined not to grant a prohibition" where the party had married his sister's illegitimate daughter: a marriage within the degrees of consanguinity, not affinity. No sufficient authority appears for the dictum of BULLER, J., in *Rex v. Hodnett*, 1 Term. Rep. 96, 101, that "the rule that a bastard is *nullius filius* applies only to the case of inheritances." [Lord DENMAN, C. J., referred to *Priestly v. Hughes*, 11 East, 1.]

Wallinger and Badeley, contra.(b) As to the argument from the statutes. It may be admitted that stat. 25 H. 8, c. 22, is repealed, although it is to be observed that in *Sherwood v. Ray*, 1 Moore, P. C. C. 353, 396, PARKE, B., appears to have referred to it as still in force. But this it is unnecessary to determine, as stat. 28 H. 8, c. 7, s. 11, is clearly in full operation. Stat. 28 H. 8, c. 16, s. 2, *refers to it in express terms; and both are in *pari materia*, with respect to certain marriages. Now it is true that stat. 28 H. 8, c. 7, was partially repealed by stat. 1 & 2 P. & M. c. 8, ss. 17, 20. But stat. 28 H. 8, c. 16, though repealed for a time by stat. 1 and 2 P. & M. c. 8, ss. 16, 20, was revived

(a) See p. 328.

(b) A full report of Mr. *Badeley's* argument in this case is published as an appendix to Dr Pusey's "*Marriage with a deceased Wife's Sister*," &c.; Oxford.

in express terms by stat. 1 Eliz. c. 1, s. 10: and stat. 28 H. 8, c. 16, s. 2, so refers to stat. 28 H. 8, c. 7, as in effect to incorporate it, so far as regards the declaration of God's law in the prohibition of marriages. This appears to have been C. J. VAUGHAN'S view.^(a) "Words and phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute, to be understood in the same sense;" 7 Bac. Ab. 451 (7th ed.), tit. *Statute* (I) 1. And "it is an established rule of law, that all acts in *pari materia* are to be taken together, as if they were one law;" Ib. 455 (I) 3. *Rex v. Mason*, 2 T. R. 581, is an instance: and Lord MANSFIELD said, in *Rex v. Loxdale*, 7 Bac. Ab. 455 (7th ed.), tit. *Statute* (I) 3, "It is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken to be one system, and construed consistently." If an act of parliament be revived, all acts explanatory of it are revived also; *Williams v. Rougheedge*, 2 Burr. 747: and the same rule is laid down, and the authorities referred to, in Dwarison on Statutes, 535 (2d ed.), where the doctrine in Com. Dig. *Parliament* (R 9), that the repeal of a statute which repealed a former one revives that former one, is applied to the case where the statute so revived mentions a still earlier statute as in force; and it is said [*198] that the statute so mentioned will be revived.

It seems, moreover, doubtful whether this portion of stat. 28 H. 8, c. 7, ever was repealed. For it is clear that the intention of 2 stat. 1 Mary, c. 1, was only to repeal so much as was necessary with respect to the papal dispensation. And, had it been considered that stat. 28 H. 8, c. 7, was repealed, it is difficult to understand why it was not expressly revived by stat. 1 Eliz. c. 1, with the other statutes there named.

Assuming, however, that it is repealed, and that stat. 32 H. 8, c. 38, is now the only statute to be regarded, the words used in that act (sect. 2) are "the Levitical degrees;" and it becomes necessary to consider the meaning of those words. The word "degrees" must be understood to mean "classes:" it cannot be confined literally to the cases mentioned nominatim in the book of Leviticus. It is in this wider sense that the word is understood by Blackstone^(b) and Cujacius,^(c) namely, that those in the same "degree" are all who stand in the same proximity to the "propositus." And this rule, as applied here, is founded on the proper construction of the 18th chapter of Leviticus itself. The particular prohibitions which it contains are to be understood as instances only: and all cases of the same "degree" with the instances mentioned are within the same prohibition. The Talmudists and Karaites among the Jews always contended for this construction;^(d) though [*194] neither class of divines is of high antiquity: and their interpretations, in other respects, do not agree.

(a) *Hill v. Good*, Vaughan, 324, 5.

(b) 2 Bl. Com. 206.

(c) Cuj. Oper. vol. viii. 219.

(d) Seld. Ux. Ebr. lib. 1, c. 3, 4, 5, 6.

But it is of more importance that the same rule of construction was adopted by the canon law: assuming that the 6th verse of the chapter—"None of you shall approach to any that is near of kin to him"—contained the general rule. Although the canon law may have extended these prohibitions farther than was necessary, the principle remains sound; and is recognised by Pothier, *Traité du Contrat de Mariage* (*Traitée*, &c., 2d ed. vol. iii. 199 et seq. part iii. ch. 3, art. 2, ss. 1, 2). The same principle was adopted by the continental Reformers of the 16th century; their views are stated by Bellarmine, *Disp. tom. iii. p. 787*, &c., de Sacramento Matrimonii, cap. xxv.; whence it appears that Luther, Calvin, and Beza looked upon the passage in 18th Leviticus as giving the general rule with only certain examples. The same opinion is asserted by Boehmer, *Jus Ecclesiasticum Protestantium*, tom. iv. 198, lib. 4, tit. 14; by Brouwer, *De Jure Connubiorum*, 507, lib. ii. c. 15. That the Reformers of the same century in this country adopted similar views appears from Bishop Jewell's Letter in the Appendix to Strype's Life of Archbishop Parker, vol. iii. p. 55 (Oxford ed.), and from the *Reformatio Legum Ecclesiasticarum*, pp. 45, 46, a compilation of persons appointed to revise the canon law in the reign of Edward the Sixth, which, although it never obtained the force of law, is valuable in illustrating the usage of the period; see Lord STOWELL's judgment in *Hutchins v. Denziloe*, 1 Hagg. Con. Rep. 170, 179.

*195] To the same effect is the judgment of GILBERT, B., *in *Butler v. Gastrill*, Gilb. Ca. Eq. 156, 158, S. C. Bunb. 145: "When we consider who are prohibited to marry by the Levitical law, we must not only consider the mere words of the law itself, but what, from a just and fair interpretation, may be deduced from it;" and this in cases of affinity as well as consanguinity. In 2 Inst. 683, it is said: "herein note, that albeit the marriage of the nephew cum amitâ et materterâ is forbidden by the said 18th chapter of Leviticus, and by express words the marriage of the uncle with the niece is not thereby prohibited, yet is the same prohibited, quia eandem habent rationem propinquitatis cum eis qui nominatim prohibentur, et sic de similibus." To the same effect is Ayliffe's *Parergon*, 363, 4; and this is the foundation of what is said in *Clement v. Beard*, 5 Mod. 448, (a) where marriage with a wife's sister's daughter seems to have been thought incestuous. This appears also to have been assumed in *Rennington's Case* (b) and in *Ellerton v. Gastrell*, 1 Comyns's Rep. 318, *Watkinson v. Mergatron*, Sir T. Raym. 464, and *Denny v. Ashwell*, 1 Stra. 53, the temporal courts declined prohibiting the Ecclesiastical courts, as considering such marriages not to be, in the sense of stat. 32 H. 8, c. 38, s. 2, "without the Levitical degrees." And in a very recent case, *Regina v. Wye*, 7 A. & E. 761, this Court recognised and gave effect to a sentence of the Ecclesiastical Court, annulling a

(a) See *Howard v. The Chancellor of Salisbury*, 1 Mod. 25, and the note there.

(b) Cited in *Howard v. Bartlet, Hobart*, 181 (5th ed.)

marriage with a brother's daughter, which is not a marriage expressly prohibited in terms by the 18th *chapter of Leviticus, though it [*196 is by the table of degrees.

That, if this principle be adopted, marriages of affinity are to be regarded exactly in the same light as those of consanguinity, follows from the religious principle of the intimate union between man and wife, so that whoever is "near of kin" to the one is necessarily so to the other; from the whole course of the decided cases, which make no distinction between the two; and from the direct prohibition in the 18th chapter of Leviticus against marriage with the brother's wife, which by the parity of reasoning, already contended for as the principle, extends to the wife's sister also. As to the identity, for this purpose, of the ties of consanguinity and of affinity, reference may be made to Vinnius, in *Inst. lib. i. tit. x. (c. 6, pp. 68, 69, ss. 1, 5)*.

With regard to the argument, that the direct prohibition in the 18th verse of the same chapter against marrying a wife's sister in the wife's lifetime impliedly allows it after her death; the better interpretation of that verse would seem to be that it is a prohibition against polygamy in general: the more proper reading would be "thou shalt not take one wife to another." See in Schleusner's *Novus Thesaurus*, voce *adulterium*, the note on this verse; Junius & Tremellius's translation of the Bible; Hammond's Works, fol. ed. vol. i. p. 583; Poole's Synopsis, ad locum (vol. i. p. 577). Another interpretation, which has been much received, applies the precept to concubinage with a wife's sister; Patrick's Commentary, ad locum (vol. i. p. 408, 5th ed.) The doubt arising from this verse was alluded to by VAUGHAN, C. J., in *Hill v. Good*, Vaughan, 312; and he seems to consider *that the words [*197 "in her life" should be connected with the words "to vex," and be understood as indicating the disturbance of mind which a wife would undergo if she believed her husband to be likely, after her death, to marry her sister.

Neither the common law nor the equity Courts have adopted the construction contended for on the other side. Marriage within the degree now in question has been held incestuous in *Harris v. Hicks*, 2 Salk. 548, in *Collet's Case*, 2 (T.) Jones, 213, *S. C. Skinner*, 37, and in *Brownsword v. Edwards*, 2 Ves. Sen. 243. As to the only cases which are cited to show that the courts of common law have at all adopted different views: note 149, in Hargrave and Butler's edition of Coke on Littleton (Co. Lit. 235 a), seems to show that in *Parsons's Case*, Co. Lit. 235 a, a consultation was granted two years after the decision mentioned by Lord Coke; and in *Manue's Case*, Moore, 907, *S. C. Cro. Eliz.* 228,(a) the prohibition may perhaps have been granted on the first

(a) It seems that the word "within," in Croke's report, is a misprint for "without." See Vaughan, 321.

occasion; but, from the report in Croke, it appears beyond a doubt that a consultation was ultimately awarded there also.

Taking it therefore that the words "prohibited degrees," in stat. 5 & 6 W. 4, c. 54, s. 2, mean the same as "Levitical degrees" in stat. 32 H. 8, c. 38, s. 2, marriage with a wife's sister must be deemed to be within the "prohibited degrees" of the statute of W. 4.

With regard to the argument raised on 2 stat. 1 Mary, c. 1, s. 8, it is certainly questionable whether that statute is not repealed by stat. 1 Eliz. c. 1. For the latter, by sect. 10, revives stat. 28 H. 8, c. 16: it *revives, therefore, all that is therein said for the purpose of annulling dispensations and bulls from Rome: and, inasmuch as the marriage of Katharine of Arragon was grounded on papal dispensation, which marriage it was the purpose of 2 stat. 1 Mary, c. 1, to render valid, it would seem that both statute and marriage were annulled by the act of Elizabeth. And the last-mentioned act seems in another way to make void the statute of Mary; for, if stat. 28 H. 8, c. 16, does, as was contended in an earlier part of this argument, incorporate the provisions of stat. 28 H. 8, c. 7, against incestuous marriages, then stat. 1 Eliz. c. 1, s. 10, reviving stat. 28 H. 8, c. 16, declares marriage with a brother's wife unlawful; and such was the marriage of Katharine with Henry. But, in reality, 2 stat. 1 Mary, c. 1, has no bearing on the case. It has never been held in this country that marriage with a brother's wife was valid by reason of it. The statute, being applicable expressly to a particular marriage, cannot be extended to marriages in general; 19 Vin. Ab. 517, 518, *Statutes* (E. 6), pl. 66, 69, (a) *College of Physicians v. Butler*, Littleton's Rep. 168, 212, 246, 247. Lastly, 2 stat. Mary, c. 1, is in effect annulled by stat. 1 Eliz. c. 3, which recognised Elizabeth's title to the throne as "rightfully, lineally, and lawfully descended;" because, if Henry VIIIth's marriage with Anne Boleyn was good, which was implied in that recognition, then that with Katharine of Arragon was a bad marriage.

It remains to be considered how the Ecclesiastical law of this country stands upon the subject. Nor is this question rendered immaterial by the doctrine which Lord HARDWICKE laid down in *Middleton v. Croft*, Ca. K. B. Temp. Hard. 57, 326; S. C. 2 Str. 1056; 2 Atk. 650. If *it were necessary, grounds might be shown for thinking that the doctrine there requires to be reconsidered; for it was extrajudicial as regarded the case. The questions were: 1. Whether a canon in affirmance of the ancient law of the country was binding on the laity; 2. Whether a canon so made was interfered with by a subsequent statute on the same subject-matter. And the point really decided was, that a canon in affirmance of the ancient law was binding on the laity. As to the more general position supposed to be laid down by Lord HARDWICKE, it has been held, by earlier authorities, some of which are rather summarily disposed of by him, that canons bind all the subjects of the

realm; *Bird v. Smith*, Moore, 781, 788, *Grove v. Elliot*, 2 Ventris, 41, and the legislature, by the preamble to stat. 24 H. 8, c. 12, seems to have considered that Convocation was, as a body, sufficient to determine matters distinctly ecclesiastical. [COLERIDGE, J. Would not it follow, from the doctrine laid down in *Bird v. Smith*, that, not only Convocation, but archbishops and bishops, within their respective provinces and dioceses, have power to make laws binding on the laity in matters ecclesiastical, such as marriage?] It would: but that case is cited as to the general rule, and not the particular and incorrect deduction. Further, if, as Lord HARDWICKE admits, the canons ipso jure bind the clergy, they must bind the laity in cases where the intervention of the clergy is necessary, as in the ecclesiastical celebration of marriage.

Upon the principle, however, of *Middleton v. Croft*, Ca. K. B. Temp. Hard. 57, 326, S. C. 2 Str. 1056, 2 Atk. 650, it is necessary to show that the 99th canon is in affirmance of the ancient law of the country, and therefore binding on the laity. If it can be shown that the *ancient [*200 ecclesiastical law, not only elsewhere, but here, has always declared these marriages to be incestuous, then the canon is binding on the laity, even in Lord HARDWICKE's opinion: for he says, (a) "There are many of those canons" (of 1603) "which are only declaratory of the ancient usage in the church, which by reason of such ancient allowance will bind the laity."

The ancient law of the church on this subject is found in the Apostolical Canons, to which Bishop Beveridge (b) has assigned the date of about A. D. 200: and the prohibitions of these canons in matters of faith and morals are not to be disregarded because they may contain other rules of discipline which have been since relaxed. It has, indeed, been suggested that the rule laid down in these canons is, only, "Qui duas sorores duxit, vel consobrinam, non potest esse clericus;" but that prohibition is founded on the principle that such persons are impure: see the commentaries in Beveridge's *Synodicon*, vol. i. p. 18. That canon was followed by a number of others in the early church: those of EMBERIS, A. D. 318; (c) Neo-Cæsarea, A. D. 314; (d) Orleans, A. D. 511; (e) Epæone, A. D. 517; (g) and the opinion of the early church is farther evinced by St. Basil's Epistle (160th) to Diodorus on the marriage with a wife's sister (*Opera*; ed. Bened. vol. iii. p. 249 (h)). The same doctrine prevailed in the Greek church; 54th Canon of the 6th Council in Trullo, Beveridge's *Synodicon*, vol. i. p. 222. It became incorporated in the Canon Law in the West; *Corpus Juris Canonici*, vol. i. p. 1842, 1849; Clementine *Constitutions, lib. iv. tit. 1 (*Corp. Jur. Can.* [*201 iii. 254). The law of prohibition of marriage with near of kin, including the kin of a deceased wife, was adopted in England; *Laws of*

(a) Ca. K. B. Temp. Hardw. 327.

(b) Annot. in *Can. Apost.* p. 4, s. 10.

(c) Harduin. Act. Conc. tom. i. p. 256.

(d) Ib. I. 282.

(e) Ib. II. 1011.

(g) Ib. II. 1050. (Yenne?)

(h) See also his epistle (217th) to Amphiloehus, iii. 329.

King Edmund, in the ancient Laws and Institutes of England, published by the Record Commission, p. 109, art. 9, and note there; of Ethelred, ib. 135, 6; of Canute, ib. p. 156, art. 7. And the same rule will be found in the ancient English church; see Spelman's Concilia, vol. i. pp. 97, 272, 298, 417, 463, 501, 516, 544; vol. ii. pp. 8, 22, 34, 178, 235, 473, the last being the Council of York, A. D. 1317. The general canon law itself, as regards this subject, was early adopted into the law of England: Bracton, 63, a, lib. ii. cap. 29, s. 3; Fleta, lib. i. cap. 14; Yearb. Hil. 18 Ed. 4, pl. 28, fol. 29 A; Hil. 18 H. 6, pl. 3, fol. 340 B; Lyndwood's Provinciale (ed. 1679), 273, 4 (ad lib. 4, tit. 3 t), where the *impedimentum canonicum* is referred to as known; and ib. 275 f, 276 n; also ib. p. 180 (ad lib. 3, tit. 13 g), where it is said, of the word *consanguineus*, "Hæc dictio generalis est, tam quoad clericos, quam ad laicos." So the definitions of consanguinity and affinity, given by John De Athon, Ad Const. Othob. tit. 52 n (p. 154 of the edition appended to Lyndwood's Provinciale), are identical with those of the canon law. See John De Burgh's Pupilla Oculi, part 8, cap. 9 B, a work referred to by TINDAL, C. J., in Regina v. Millis, 10 Clarke & Fin. 534, 683; and the doctrine of John De Burgh is referred to and adopted in Summa seu Destructorium Vitiatorum (Part iii. c. 7, fol. 23 a). See also Alexander de Ales, Summa Theologica, Part. ii. Quest. 169, memb. 2. The principle had also been incorporated in the civil law, and in the laws of *202] most of the early Christian nations of Europe, at an early *period: Pothier, Traité du Contrat de Mariage, part 3, ch. 3, art. 2, ss. 1, 2; Lindenbrogius, Codex Legum Antiquarum, pp. 69, 593, 595.

Such was the state of the law at the passing of stat. 32 H. 8, c. 38: and that statute, while it cut off certain prohibitions which had been imposed merely by ecclesiastical authority, retained all that regarded cases within the Levitical degrees, as being of divine authority. This was a distinction which had long prevailed in the canon law, it being held that the papal power of dispensation, if it extended at all to this latter class of prohibitions, could only be used for the gravest reasons and in extreme cases; Corpus Juris Canonici, tom. ii. p. 635; Liber Officialis Sancti Andreae, edited by Lord Medwyn (privately printed); see preface, p. xxii.; although a different rule has prevailed in later and more corrupt times in the Roman Catholic Church. That the wife's sister was, in the opinion of the English canonists and ecclesiastical lawyers at the time of the Reformation, included in the "Levitical degrees," is clear from the Reformatio Legum Ecclesiasticarum, pp. 45, 46, the table of Archbishop Parker, incorporated in the 99th Canon of 1603; the letter of Bishop Jewell, already cited (Appendix to Strype's Life of Parker, vol. iii. p. 55); 2 Inst. 683; the passage referring to the canons in Butler v. Gastrill, Gilb. Ca. Eq. 156, 159; and, it may be added, from the uniform practice of the ecclesiastical courts, the jurisdiction of which existed before stat. 32 H. 8, c. 38, and was unimpaired by it, and

which are for this purpose superior Courts, and of the highest authority; LITTLEDALE, J., in *Ricketts v. Bodenham*, 4 A. & E. 433, 446, Lord COKE in *Bunting v. Lepingwell*, 4 Rep. 29 *a*, Lord *LYNDHURST, [*208 C., in *Regina v. Millis*, 10 Clarke & Fin. 534, 844, *Watkinson v. Mergatron*, Sir T. Raym. 464, *Faremouth v. Watson*, 1 Phillim. 355, *Chick v. Ramadale*, 1 Curteis, 34, *Sherwood v. Ray*, 1 Moore, P. C. C. 353, confirmed by *Hill v. Good*, Vaughan, 302, *Harris v. Hicks*, 2 Salk. 548, and *Collet's Case*, 2 (T.) Jones, 213.

As to the point peculiar to the present case, namely, that which arises from one of the parties being illegitimate: it is remarkable that it should never have been expressly decided in this country. But that the laws of consanguinity and affinity apply to bastards as well as to other persons, is to be collected from many cases; *Haines v. Jescott*, 5 Mod. 168; S. C. 1 Ld. Raym. 68, 1 Comyns's Rep. 2; *Regina v. Chafin*, 3 Salk. 66; *Rex v. Hodnett*, 1 T. R. 96 (the dictum in which is adopted in the note F. to 1 Thomas's Co. Litt. 146); *Horner v. Horner*, 1 Hagg. Cons. R. 337, 352.

Bracton, fol. 21 *a* (l. ii. c. 7, s. 2), in discussing the reversionary right of the donor in case of failure of heirs of the donee, says that a bastard is "extraneus" to his brother "quoad successionem, licet non quoad sanguinem." So Ayliffe, Parerg. 326, adopts the doctrine that, without a marriage contract, "affinity may be contracted in bar to matrimony." In the *Pupilla Oculi* (part 8, c. 10 A), it is said: "oritur affinitas tam ex coitu fornicario quam matrimoniali seu legitimo. Et generaliter ex omni carnali commixtione per quam vir et mulier dicuntur effici una caro." In the *Declaratio Arboris Consanguinitatis*, in Corp. Jur. Can. tom. i. p. 1853, are the words following: "quoad probationem conjugii non distinguo, an tales consanguinei sint *producti ex uxorio coitu, vel ex fornicario;" and similarly, in the *Arbor Affinitatis*, [*204 in Corp. Jur. Can. vol. iii. (*ad finem*), it is laid down that affinity, arising from illicit intercourse, is on the same footing with affinity arising from marriage. In the *Aurea Summa* of Hostiensis, p. 1198, the question as to civil succession is distinguished from that regarding marriages: as to which latter it is said, "non est inspicienda nisi sola conjunctio naturaliter." Brouwer, *De Jure Connubiorum* (l. ii. c. 13, p. 482), distinguishes actual (as opposed to fictitious) affinity into the "legitima" and the "naturalis ex stupro, scortatione, vulgivagâ venere, concubinato, incestu;" and he treats the latter as an impediment to marriage, including even cases of violation, &c. The Jewish law (*Selden, De Jure naturali et gentium juxta disciplinam Ebræorum*, lib. v. c. 10, p. 544) equally repudiates the supposed distinction. The same principle prevailed in the civil law. Cujacius, tom. ii. p. 1049, after enumerating some prohibited degrees, adds, "etiam si qua in patris tantum concubinato fuisset." So Voet, *Comm. ad Pandect.* (l. xxiii. tit. 2, tom. iii. p. 33), says that such affinity arises "ex vetito cum meretrice congressu seu fornicatione."

And Vinnius, In Inst. lib. i. tit. 10, p. 66, says: "Ambigitur, an etiam ex illegitimâ conjunctione contrahatur affinitas;" and he answers this in the affirmative, adding: "Neque ob aliam causam, quam ob affinitatem, prohibetur filius patris sui concubinam uxorem ducere," "aut in concubinato habere."(a)

Cur. adv. vult.(b)

*205] *The case of REGINA v. CHADWICK was as follows.

James Chadwick was indicted at the sessions of oyer and terminer and gaol delivery held at Liverpool, in and for the county palatine of Lancaster (Liverpool Winter assizes, December, 1846), for bigamy. The indictment charged in the usual form that the defendant married one Ann Fisher, and afterwards, and whilst he was so married to the said Ann, feloniously married one Eliza Bestock, his said former wife being then alive. A special verdict was found, in the following words.

"That, on the 14th day of September, A. D. 1845, the said James Chadwick was married to one Ann Fisher, spinster, at," &c., "according to the rites and ceremonies of the Established Church; and that afterwards, viz. on the 23d day of March, A. D. 1846, the said James Chadwick was married, at," &c., "to one Eliza Bestock, spinster, according to the rites and ceremonies of the Established Church, she the said Ann Fisher then being still alive. And that the said Ann Fisher, to whom the said James Chadwick was so married as aforesaid, on the 14th day of September, A. D. 1845, was the lawful sister of one Hannah Fisher to whom the said James Chadwick had been lawfully married on the 27th day of June, A. D. 1825; and that after the marriage of the said James Chadwick with the said Hannah Fisher, they the said James Chadwick and Hannah Fisher lived together as man and wife: and which said Hannah Fisher departed this life before the said time when the said James Chadwick was married to the said Ann Fisher as aforesaid. But

*206] whether or not upon the whole matter," &c., "found the *said James Chadwick is guilty of the felony," &c., "the said jury are altogether ignorant;" &c.

Judgment was given, at the Assizes, by WIGHTMAN, J, that the said J. C. is Not guilty, &c., and that he go without a day, &c.

Error was brought on the judgment; the only cause assigned being that judgment had been given for the defendant on the special verdict, whereas it should, by law, have been given against him. Prayer of reversal, &c. Joinder.

The writ of error was argued in the present Michaelmas term, November 17th and 20th.

Sir F. Kelly, for the Crown. Stat. 5 & 6 W. 4, c. 54, s. 2, annuls all marriages thereafter to be celebrated between persons within "the

(a) But, by the Scotch law, "Incest is not committed by connexion with bastard relations, how near soever;" Allison's Principles, ch. xxix. s. 2 (p. 565).

(b) The argument in this case is partly reported by H. Merivale, Esq.

prohibited degrees of consanguinity or affinity:" and the question will be what and by whom imposed, is the prohibition to which this force is given. The principal statutory authority, before the act of William, is stat. 32 H. 8, c. 38, s. 2; and that confirms, notwithstanding any pre-contract (not consummate) or dispensation, all marriages contracted within the Church of England between "lawful persons," such marriages being contract and solemnized in the face of the church and consummate; and declares "all persons to be lawful, that be not prohibited by God's law to marry." Then, what is prohibited by God's law? The prohibition must be looked for in the express words of Scripture. By the law of nature all marriages are free, though some may be highly inexpedient. A law to abridge that natural freedom must be construed strictly, not extended by analogy or on the ground of a supposed parity of degree. *The Divine ordinance on this subject is found in the 18th chapter of Leviticus, and does not in terms include marriage with a [*207 wife's sister: and the letter of that law was acted upon by the Jews and early Christians down to the year of our Lord 813, when the council of Eliberis imposed a penance on the man who should contract such a marriage. The history of this and similar usurpations is traced in Reeves's History of the English law, vol. iv. 52, et seq. (3d ed.), c. 25, and Hallam, Middle Ages, c. 7 (vol. ii. p. 293, &c., 4th ed.): and they were still in force when, by stat. 32 H. 8, c. 38, the prohibition was, in this country, brought within the limits prescribed by the law of God. (He then proceeded to discuss the material passages of the 18th chapter of Leviticus. This part of the argument, being laid out of consideration by the Court in its judgments, is not further stated here: but a notice of the discussion on the same points will be found in the report of the preceding case.) It is suggested, in favour of the inferential construction, that, without it, some marriages clearly not allowable, as between a man and his grandmother, are unprohibited by the Levitical law; but in many other instances the Divine law is silent as to offences which God cannot have intended to sanction, but which it has been unnecessary to point out, either because there was no likelihood that men would be tempted to them, or because it was clear, without their being specified, that they were contrary to the Divine will. If the 18th chapter of Leviticus does not contain a complete code, the same may be said of the 20th chapter of Exodus. The judgment of VAUGHAN, C. J., in *Harrison v. Dr. Burwell*, Vaughan, 206, shows the impression, at *the time when that case was decided, to have been that our law, in forbidding mar- [*208 riages as contrary to the law of God, included degrees which, "in the meaning of the 18th of Leviticus, were not absolutely, but circumstantially prohibited;" (a) among which was the marriage with a brother's wife, not (as is there said) prohibited by the Levitical law, "but when the dead brother left issue by his wife." (b) VAUGHAN, C. J., adds: "A

(a) Vaughan, 240.

(b) Deut. a. xxv. v. 5—10.

man is prohibited by 28 H. 8" (stat. 28 H. 8, c. 7, s. 11, which, however, had been repealed), "and by the received interpretation of the Levitical decrees, absolutely to marry his wife's sister: but within the meaning of Leviticus, and the constant practice of the commonwealth of the Jews, a man was prohibited not to marry his wife's sister only during her life, after he might:" and this agrees with Michaelis, vol. ii. p. 112, cited in T. C. Foster's "Review of the law relating to marriages within the prohibited degrees of affinity," p. 79. It was argued in *Regina v. St. Giles in the Fields*, ante, p. 193, that, in the enactment of stat. 32 H. 8, c. 38, s. 2, "that no reservation," &c., "God's law except, shall trouble or impeach any marriage without the Levitical degrees," the word "degrees" must not be confined to the particular instances of degree mentioned in the 18th of Leviticus, but must be taken as extending to similar degrees, and as comprehending classes. There is, however, no expression in the clause warranting this assumption. And the word "degrees" had before been used in stat. 28 H. 8, c. 7, ss. 11 and 13, as signifying particular relationships enumerated in that act, and not as a technical term signifying a mode of being related. In G. L. Boehmer's *Principia Juris Canonici*, p. 322, B. 3, s. 2, tit. 6, s. 398 *209] (7th ed., 1802), it is laid down that, where the divine law specifies persons who may not marry, the interpretation by parity is inadmissible; and it is also said that marriages not expressly prohibited may be permitted by dispensation; "*cujusmodi sunt nuptiæ cum defunctæ uxoris sorore.*"(a)

Kelly then discussed the effect of the repeal and revival of statutes from 25 H. 8 to 1 Eliz.; but the principal arguments on this head are already reported in the preceding case. He observed that stat. 32 H. 8, c. 38, did not, when declaring the lawfulness of certain marriages, refer to the definitions of illegality contained in former statutes, although there were two on that subject in force at the time; he urged that, when a former act of the same reign (28 H. 8, c. 16, s. 2) intended to limit the law by reference to previous enactments, it made express allusion to the statute (28 H. 8, c. 7): and he inferred that, in construing stat. 32 H. 8, c. 32, the Court were bound to consider only "God's law," the sole authority there pointed to, and must inquire this out for themselves. He further contended that, even if this could have been otherwise, there remained no statutory declaration of God's law to be embodied in the last two acts of H. 8, since all the clauses of stat. 28 H. 8, c. 7, which contained such declaration had been repealed by stat. 1 & 2 Ph. & M. c. 8, ss. 17, 20, and were not revived by stat. 1 Eliz. c. 1, the language of which act, from sect. 10 to sect. 13, showed no intention to carry back the rule of law on this head, but only to abolish some *acts of the *210] late reign on other subjects, and to continue the repeal of those

(a) In this part of the argument *Kelly* also referred to *Jeremy Taylor's Ductor Dubitantium*; see Book 2, c. 2, Rule 3. Works (ed. by Heber, 1822), vol. xii. pp. 307—350.

enactments, made in the time of Henry 8th, which affected the Queen's legitimacy. (a) When an act, explained and amended by other acts, has expired, and is revived, the other acts, if they also have expired, are revived for the purpose, strictly, of explanation and reference, and no farther: this is the whole effect of *Williams v. Rougheedge*, 2 Burr. 747.

It might be expected from the variety of legislation on this subject that there would be confusion and inconsistency in the decisions. The first case extant, after stat. 32 H. 8, c. 32, is *Manue's Case*, Moore, 907, S. C. Cro. Eliz. 228, 4 Leon. 16, (b) (33 Eliz.), where, according to Moore's report, the party was sued in the Court Christian for marrying one of his wife's sister's daughters, and a prohibition was awarded, because such marriage is not prohibited by the Levitical law. In Leonard's report it is said that, although the marriage was "not expressly within the Levitical degrees, yet because more farther degrees are prohibited the Archbishop of Canterbury and other the Commissioners gave sentence against him, upon which he sued a prohibition upon the stat. of 32 H. 8, c. 38." A consultation was afterwards granted; but only (as appears by the report in Leonard, with which that in Croke agrees) because "the prohibition was general where it ought to be special." The next is *Parsons's Case*, Co. Litt. 235 a, (c) (2 Ja. 1), where, as Lord Coke states: "A man married the daughter of the sister of his first wife, and was drawn in question in the Ecclesiastical Court for this marriage, alleging the same to be against the canons; and *it was resolved by the [*211 Court of Common Pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said act of parliament" (32 H. 8, c. 38) "to be good, inasmuch as it was not prohibited by the Levitical degrees, et sic de similibus." Mr. Butler's note (149) on this passage shows how a contrary doctrine gained ground by the influence of the ecclesiastics. *Parsons's*, or *Pearson's Case* is noticed at length in *Harrison v. Dr. Burwell*, Vaugh. 248, 9; and it appears there that a consultation was granted, but on a point in the pleadings. The next decision, *Hill v. Good*, Vaugh. 302 (25 Car. 2), is contrary to those preceding: and almost every subsequent decision to the same effect has been founded upon this, without any deliberate argument. VAUGHAN, C. J., grounds his judgment against the writ of prohibition on three reasons: 1. That the marriage with a wife's sister is expressly prohibited by the 18th Leviticus: 2. That, although it were not expressly prohibited, it is still not without the Levitical degrees: both which assumptions are incorrect if the preceding argument in this case be well founded: and 3. That the marriage, if without the Levitical degrees, is yet prohibited by God's law, and therefore may be impeached, consistently with stat. 32 H. 8, c. 38. But for this last

(a) See 1 Gibb. Cod. 410 (2d ed.), notes b, c.

(b) See Vaughan, 321, 247, 8, 9.

(c) And see 2 Inst. 633.

proposition he relies (a) upon the non-repeal of stat. 28 H. 8, c. 7 (sects. 11, 12, 13), and upon the canons. Of the canons which existed at the passing of stat. 32 H. 8, c. 38, those only were in force, by stat. 25 H. 8, c. 19, sects. 2, 7, which were "not contrariant or repugnant to the laws, statutes, and customs of this realm:" and the only canons framed *212] after the year 32 H. 8 were those *of 1603, which have not in themselves any binding authority over the laity; *Middleton v. Crofts*, 2 Atk. 650, 653, *Matthew v. Burdett*, 2 Salk. 412, (b) *Regina v. Millis*, 10 Cl. & Fin. 534, 680, 875, opinions of TINDAL, C. J., and Lord COTTENHAM. *Hill v. Good*, Vaugh. 302, was followed by *Wortly v. Watkinson*, 2 Lev. 254, S. C. 3 Keb. 660 (81 Car. 2), where, in the case of a marriage between a man and the daughter of his first wife, a consultation was granted, and *Hill v. Good* was relied upon in the argument. *Snowling v. Nursey*, 2 Lutw. 1075 (13 W. 3), where also *Hill v. Good* was referred to, seems to have been decided partly on reference to the canons of 1603. In *Butler v. Gastrill*, Gilb. Ca. Eq. 156, S. C. Bunb. 145 (8 G. 1), where a consultation was awarded in a case of marriage with the wife's aunt, the judgment turned upon the authority of the Church to enact canons which should be recognised by laymen; and reliance was placed on *Hill v. Good*, and the later decisions founded on that case. Two other cases, of the times of Car. 2, and W. & M., may be cited: but the first, *Watkinson v. Mergatron*, Sir T. Ray. 464, clearly proceeded on an error; for, the suit being for marrying a sister's daughter, and the defendant having "prayed a prohibition because out of the Levitical degrees," this was "denied by the whole Court, because it is a cause of ecclesiastical cognisance, and divines better know how to expound the law of marriages than the common lawyers;" an argument which would deprive the common law Courts of their authority under stat. 32 H. 8, c. 38, s. 2. The other case, *Harris v. Hicks*, 2 Salk. 543, cannot be considered a decision on the point *213] *now before the Court. In *Sherwood v. Ray*, 1 Moore's P. C. 353, (c) (1 Vict.), this point was not directly raised. There is indeed a dictum of PARKE, B., in the judgment of the Court delivered by him, that the marriage with a wife's sister, "having been celebrated between persons within the Levitical degrees, and prohibited from intermarrying by Holy Scripture, as interpreted by the canon law and by the statute 25 H. 8, c. 22, s. 3, was unquestionably voidable during the lifetime of both, and might have been annulled by criminal proceedings or civil suit;" pp. 395, 6. (d) But that cannot be looked upon as a considered decision of the point of law. It may be that the practice in Ecclesiastical Courts for many years has been to dissolve these marriages; but, when this Court is called upon to apply a statute (5 & 6 W. 4, c. 54)

(a) Vaugh. 323.

(c) See *Ray v. Sherwood & Ray*, 1 Curt. 173, 193.(b) And see *ibid.* 672, 3.

(d) And see p. 397.

by which, if a marriage falls within it, the issue is bastardized, they must exercise their own judgment, and determine, without regard to ecclesiastical authority, what marriages are really within stat. 32 H. 8, c. 38, as "prohibited by God's law." Even if, in so doing, they should reverse that which has been deemed the law for two hundred years, yet, as Lord DENMAN, C. J., argued in *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 368—371, such consideration must not deter them from correcting an ascertained error.

Aspland, *contra*. Stat. 5 & 6 W. 4, c. 54, in using the term "prohibited degrees," does not refer directly to prohibitions by the law of God, and, therefore, had not in view either the parts of the Old Testament *relating to such prohibitions, or the older statutes [*214 declaring the law of God on this subject. It was passed to enforce a merely civil regulation; and it adopted the term in question as one of well understood import in the English language, recognising the practice of the Ecclesiastical Courts with respect to marriages included in the commonly known table of prohibited degrees. That the term "prohibited degrees" has long acquired a definite meaning, and includes the relationship between a man and the sister of his deceased wife, appears from 2 Inst. 683, where a table is given of "degrees of affinity or alliance prohibited," in which such a marriage is included; from Archbishop Parker's Table of 1563, given in 2 Burn's Ecc. L. 442, and 4 Burn, Ecc. L. 659, 9th ed.; from the Canons of 1603, can. 99, in 2 Burn, Ecc. L. 446; from 1 Gibs. Cod. p. 414 (2d ed.); and from the general course of decisions in the Ecclesiastical Courts. To show how universally it was understood that such a marriage is included in the list of prohibited degrees, reference may be made to a judgment pronounced by Lord BROUGHAM in the House of Lords, only a few days before the statute received the Royal Assent. He says, in *Warrender v. Warrender*, 2 Cl. & Fin. 488, 531, S. C. 9 Bligh, N. S. 89: "We should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country:" and proceeds to express an opinion that English Courts would refuse to sanction such marriages, though solemnized in countries where the law permits them. The preamble of stat. 5 & 6 W. 4, c. 54, supports the view now contended for. A civil inconvenience (the uncertain condition in which the issue of such [*215 marriages are kept while the parents live) is recited; and the practice of the Ecclesiastical Courts is referred to. Whether that practice was correct or not, is immaterial; the reference to it explains the intention of the statute. Sect. 1 declares that past marriages, where no suit is pending, are not to be annulled for affinity: it is not to be supposed that, if the degrees were treated as marked out by the law of God and by statutes defining that law, the Legislature would have felt authorized

to lay down a different rule for marriages within those degrees happening before, and such marriages happening after, a certain date. Stat. 9 Geo. 4, c. 31, s. 22 (on which indictments for bigamy are founded), contains a saving proviso for any one who, at the time of the second marriage, shall have been divorced from the bond of the first marriage, or whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. As a marriage within the degrees prohibited is now absolutely void, there will be no sentence of an Ecclesiastical Court to declare it void; the operation of the proviso in such a case has, therefore, been repealed; and it is reasonable to suppose that the repealing statute meant to substitute some other guide in lieu of a sentence in the Ecclesiastical Court; and that substitute must be the past practice (which the statute recites) of the Ecclesiastical Courts. Stat. 5 & 6 W. 4, c. 54, has always, since its passing, been understood, both in and out of the profession, to avoid such a marriage as this; and such appears to be the plain and obvious construction.

*216] *Assuming, however, that the recent statute is not alone decisive of the question, it can be shown in various ways that this marriage is prohibited by the older statutes. Stat. 25 H. 8, c. 22, s. 3, mentions this as amongst the degrees of marriage "prohibited by God's laws," and "plainly prohibited and detested by the laws of God." Stat. 28 H. 8, c. 7, if it partly repealed the former statute, re-enacted its provisions on this subject, by sect. 11: and stat. 28 H. 8, c. 16, enacts (sect. 2) that certain marriages shall be valid whereof there is no divorce, "and which marriages be not prohibited by God's laws, limited and declared in the act made in this present parliament" (c. 7), "or otherwise by Holy Scripture." These statutes, if they can now be looked at, decide the present question. And, 1. The portions of stat. 28 H. 8, c. 7, material to the present inquiry, have never been repealed. 2. If repealed, they have been revived, and are now in force. 3. If not revived so as to have a binding force of themselves, yet they are so referred to by, and incorporated with, other statutes now in force, that their declarations as to God's laws must be received as parts of those statutes.

1. There is no reasonable ground for contending that stat. 32 H. 8, c. 38, affected the general marriage law as declared by stat. 28 H. 8, c. 7. Its object was entirely different; it was passed in 1540, just before the King's marriage with Catharine Howard, who was the cousin-german of his former Queen Anne Boleyn, but not related to himself: it recites (sect. 2) "an unjust law of the Bishop of Rome," whereby persons have, upon pretence of former contracts, "been divorced contrary to God's
*217] law; and further also, by reason of other *prohibitions than God's law admitteth, for their lucre by that Court invented, the dispensations whereof they always reserved to themselves, as in kindred or affinity between cousin-germans, and so to fourth and fourth degree,

carual knowledge of any of the same kin, or affinity before in such outward degrees, which else were lawful, and be not prohibited by God's law," &c.; and then enacts that all and every such marriages as "shall be contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry), such marriages being contract and solemnized in the face of the Church, and consummate," &c., shall be "lawful, good, just, and indissoluble, notwithstanding any precontract," &c., and "notwithstanding any dispensation," &c., "and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." The object of the act, as appears both by the preamble and by the express provisions, was merely to prevent divorces for precontract, or on the ground of the kindred or affinity subsisting between cousins-german or more distant relations. This statute is quite consistent with stat. 28 H. 8, c. 7; and the two (being in *pari materia*) must be construed together. And, even if stat. 32 H. 8, c. 38, must be looked at alone, it plainly admits, first, that a marriage *within* the degree of relationship of cousins-german is illegal; secondly, that relations by blood and by affinity are, for this purpose, on the same footing. It therefore strengthens the argument against the legality of marriage with the sister of a deceased wife.

The act 2 stat. 1 Mary, c. 1, did not repeal the portions in question of stat. 28 H. 8, c. 7. This statute *of Mary was not a general marriage act; it was passed for the purpose of declaring one particular marriage (that of Henry and Queen Katharine) valid. It did not profess to set up any class of marriages. Besides, if it implicitly extended to a class, that class was of marriages with two brothers in succession; which marriages stand on different grounds from the marriage now under discussion. It is to be observed, also, that this statute proceeds partly on the ground of the Queen's absence at the time of sentence given (sect. 4); and it is a matter of history that the sentence was founded (a) partly on the consummation of the marriage with Prince Arthur, which was denied by Queen Mary; and that is, probably, the true foundation on which the statute rested: if so, it is no way inconsistent with the prohibitions contained in stat. 28 H. 8, c. 7, which apply only where there has been consummation of a former marriage. Nor were the prohibited degrees altered by stat. 1 & 2 Ph. & Mary, c. 8: that statute was not passed to alter the general marriage laws, nor to set up the legitimacy or title of Queen Mary. The latter purpose had been fully effected by 2 stat. 1 Mary, c. 1. To pass a further statute with that object would have been to weaken her title; whereas, a marriage having in the mean time taken place between the Queen and a

(a) The sentence does not, in terms, refer to the supposed fact: but it is much insisted upon in the depositions. See the proceedings at length in the "Proceedings relative to the divorce of Katharine of Arragon," 1 Howell's State Trials, p. 299, pp. 325—8, 358.

Roman Catholic prince, a strong supporter of the Church of Rome, it was natural that statutes should now be passed to reinstate the Pope in his former power. Accordingly, by stat. 1 & 2 Ph. & M. c. 8, s. 2, all *219] statutes against the *supremacy and see of Rome passed since 20 H. 8 are repealed. Besides this sweeping repeal, particular statutes and parts of statutes are specially named, and among them, by sect. 17, "all that part of" stat. 28 H. 8, c. 7, "that concerneth a prohibition to marry within the degrees expressed in the said act," is repealed. It is to be observed that stat. 28 H. 8, c. 7, by sections 11, 12, declares the prohibited degrees, and by sect. 13, forbids marriages within the degrees, though proceeding on dispensation, "for no man, of what estate, degree, or condition soever he be, hath power to dispense with God's laws." (s. 12.) There was no dispute between the two churches as to the extent of God's laws on this subject; but there was a struggle as to the dispensing power.(a) There is every reason, therefore, to conclude that the intention of stat. 1 & 2 Ph. & M. c. 8, was to leave the general law as to prohibited degrees untouched, and merely to establish an exception where a marriage may have been solemnized under papal dispensation.

2. If, however, the portions of stat. 28 H. 8, c. 7, relating to prohibited degrees, were ever repealed, they have been revived. Stat. 32 H. 8, c. 38, which was repealed by stat. 1 & 2 Ph. & Mary, c. 8, s. 19, was (with an exception not now material) revived by stat. 1 Eliz. c. 1, s. *220] 11. Stat. 32 H. 8, c. 38, as has been already *shown, must be read with stat. 28 H. 8, c. 7, being founded upon it; there is, therefore, ground to contend that the revivor of stat. 32 H. 8, c. 38, has drawn with it the revivor of stat. 28 H. 8, c. 7. Precisely the same argument may be used with reference to stat. 28 H. 8, c. 16, which is directly founded on stat. 28 H. 8, c. 7, and which, after being repealed by stat. 1 & 2 Ph. & Mary, c. 8, s. 16, is revived, and in very strong words, by stat. 1 Eliz. c. 1, s. 10.

3. Even assuming that, from whatever cause, stat. 28 H. 8, c. 7, cannot be now considered in force so as to have a binding power of itself, yet it is, historically, on the statute book, and must be looked at in order to explain statutes 32 H. 8, c. 38, and 28 H. 8, c. 16, with which it is in *pari materiâ*. It would be an anomaly in language to say that the two statutes are revived, if they are not to exist in the same sense in which they stood at the time of their repeal; and this would be so, if the former statute on which they are founded, and which gave them their meaning, could not be looked at to explain them. On this part of

(a) Even at a later period the power of dispensing with the Levitical prohibitions was claimed for the Church of Rome. The 3d canon, *De Sacramento Matrimonii*, decreed in the 24th session of the council of Trent (held in November, 1563), is as follows:—"Si quis dixerit, eos tantum consanguinitatis, et affinitatis gradus, qui Levitico exprimuntur, posse impedire matrimonium contrahendum, et dirimere contractum; nec posse ecclesiam in nonnullis illorum dispensare, anathema sit."—*Concillii Tridentini Canonæ et Decreta*, p. 241. Antwerp, 1779.

the case, *Regina v. Stock*, 8 A. & E. 405, 410, *Strickland v. Maxwell*, 2 Cro. & M. 539, S. C. 4 Tyr. 346, and 7 Bac. Abr. 454, 5 (7th ed.), tit. *Statute* (I) 8, may be referred to.

The argument from the Mosaic law (assuming that it is necessary to consider what that law actually declares) is in favour of the defendant. The 18th chapter of Leviticus lays down two general laws: one, v. 6, against marriage between a man and any that is near of kin to him; the other, in v. 17, against marriage with his wife's near kinswoman. This particular marriage is not included: but marriage with a daughter, which no one alleges to be lawful, is not in specific *terms prohibited, [*221 and is proved to be so only by reasoning and inference, which apply equally to marriage with a wife's sister. There are strong reasons why the general laws just referred to should not be considered as limited to the particular instances stated in 18th Leviticus. (For the reason before given, p. 207, a detail of this part of the argument is deemed unnecessary.(a))

The authorities are, with remarkable uniformity, in favour of the defendant.

In Bro. Abr. *Conditions*, pl. 194 (12 H. 8, 8), is a *case where [*222 is that recognised, as a part of the ecclesiastical law, that a marriage between a woman and two brothers successively is not permissible, though a question arose as to the effect of a dispensation. In both *Manue's Case*, Moore, 907, S. C. Cro. Eliz. 228, 4 Leon. 16, and *Parsons's Case*, Co. Lit. 285 a,(b) a prohibition was followed by a consultation; though in the latter case it is left in some doubt on what ground the consultation was awarded; and in *Rennington's Case*, Hob. 181, 5th ed. (in *Howard v. Bartlett*),(c) where the High Commissioners had sentenced

(a) *Aspland* observed, on this head, that the 20th chapter of Leviticus, and 22d of Deuteronomy, forbid some of the marriages mentioned in the 18th of Leviticus; yet it could not be argued that the instances mentioned in these two chapters limit the general laws and repeal some of the specific prohibitions in 18 Levit. And, as to the text, 18 Levit. v. 18, forbidding to take a wife to her sister in her lifetime, that writers of authority were divided on the proper translation; and the law, if correctly given in the authorized version, was probably so framed in opposition to some heathen practice then commonly prevailing; a reason frequently assigned by commentators for particular precepts in the Mosaic law. Referring to the argument that a marriage with sisters successively must be as legal as marriage with brothers successively, which is said to be commanded in 25th Deuteronomy, v. 5, et seq., he answered, that this argument depended on parity of reasoning, which was declared on the other side to be inadmissible: but, supposing that objection waived, the cases were not the same, since marriage with the second brother was permitted only where the first had died childless; and the declared object was to raise up a name to him, a purpose which could not exist with reference to a deceased wife. And that, in reality, marriage with brothers successively was not commanded by the Jewish law, but permitted only, the reason of the permission being the inveteracy of a previously existing custom. That by the context of 25 Deuteronomy the custom appeared not to have been looked at with much favour; and it had been said that such marriages have now fallen into desuetude among the Jews: see 2 Michaelis, *Comm. L. Mos.* pp. 21—33 (Smith's Translation): and, if such a marriage were to be permitted now, because permitted to the Jews, all the consequences, as to inheritance and other points, must be carried out; which would be wholly inconsistent with our law.

(b) *S. C. Vaughan*, 248 (in *Harrison v. Burwell*), 322 (in *Hill v. Good*).

(c) See *Rennington v. Cole*, *Noy's Rep.* 29.

for incest in marrying a wife's niece, there was no prohibition. In *Hill v. Good*, Vaughan, 302, the marriage had been with the sister of the deceased wife, and was held unlawful. This is a clear authority for the defendant. There is an elaborate judgment, which has been often followed, and never hitherto questioned: and it proceeded upon grounds in full force at the present day; for the marriage there was held void, not merely as against the canon law, but as being prohibited by the Levitical and statute laws. In *Harrison v. Burwell*, Vaughan, 206, where a man had married with the widow of his great-uncle, the affinity was more remote than that now in question; and the general grounds of decision are confirmatory of those taken in *Hill v. Good*. If certain expressions in the judgment in *Harrison v. Burwell*, Vaughan, 240, 241, point the other way, it must be remembered that *Hill v. Good* was a subsequent case, and entitled to more weight from the fact that those *223] expressions had been uttered. In *Wortley v. Watkinson*, 2 (T.) Jones, 118, S. C. 2 Lev. 254, a consultation was awarded, the marriage questioned in the Court below being that of a man and the daughter of a sister of his former wife. In *Collett's Case*, 2 (T.) Jones, 213, 15 Vin. Abr. 255, tit. *Marriage* (E) 5, a prohibition was refused, the marriage being with the sister of the former wife. A prohibition was subsequently granted, because the proceedings in the Ecclesiastical Court were fraudulent on the part of the husband; but that does not weaken the previous decision. So in *Harris v. Hicks*, 2 Salk. 548, S. C. Comb. 200, where a man had married two sisters in succession, both dead at the time of the suit in the Ecclesiastical Court, the Court was allowed to proceed to punish the husband for the incest. In *Snowling v. Nursey*, 2 Lutw. 1075, a prohibition had been obtained on the ground that the marriage with the daughter of the sister of the former wife was without the Levitical degrees; but, after two or three several arguments, a consultation was granted. In *Denny v. Ashwell*, 1 Stra. 53, and *Ellerton v. Gastrell*, Comyns's Rep. 318, prohibitions were refused in cases of similar marriages. In *Butler v. Gastrill*, Gilb. Eq. Ca. 156, S. C. Bunb. 145, the female plaintiff in prohibition was aunt (mother's sister) to the deceased wife of her husband, the other plaintiff; and a consultation was granted. It has been said that decisions have proceeded on the canon law: but from the last cited case, as reported by Bunbury (who was counsel for the defendant), it is evident that that was not even one of the grounds of the decision; and the same appears by inference as to *224] **Snowling v. Nursey*, 2 Lutw. 1075; for EYRE, C. B., said, in *Butler v. Gastrill*, Bunbury, p. 156, that "the case of *Snowling v. Nursey* was a proper foundation for the Court's present determination;" but (the reporter adds) "seemed to think, that the Parochial Tables were not binding on the laity." It is probable, also, that some of the earlier cases were decided without reference to the canon law. The binding power of the canons on the laity had long been denied. In the judgment in *Mid-*

dleton v. Croft, Ca. K. B. Temp. Hardw. 332, 334, Lord HARDWICKE cites a case of the Prior of Leeds, 20 H. 6, (a) to this effect; and other cases from Coke's Reports; and quotes an observation of KING (C. J. of C. P.), made in the 1 Geo. 1, that it was "the prevailing opinion, that the convocation cannot make canons to bind the laity." Several years after the judgment in *Middleton v. Croft*, Lord HARDWICKE, in *Brownsword v. Edwards*, 2 Ves. sen. 243, held it good cause of demurrer to a bill filed against a woman for a discovery as to an alleged marriage between her and the husband of her deceased sister, that she might subject herself to punishment in the Ecclesiastical Court.

The cases in the Ecclesiastical Court, accessible to the profession, are to the same effect; *Aughtie v. Aughtie*, 1 Phillim. 201; *Faremouth v. Watson*, 1 Phillim. 355; *Blackmore v. Bridger*, 2 Phill. 359; *Chick v. Ramsdale*, 1 Curteis, 34, and *Ray v. Sherwood*, 1 Curteis, 173, 193, and *Sherwood v. Ray*, 1 Moore's P. C. C. 353. The last-mentioned case is of the greater weight from being finally decided in a Court of ultimate resort, and from its being a decision upon the recent statute. The opinions of Dr. *Lushington* in the consistory Court, Sir H. [*225 *Jenner* in the Arches Court, and PARKE, B., in giving judgment on behalf of the Judicial Committee of the Privy-Council, support the present argument. It is true that, in the judgment of the Judicial Committee, as reported 1 Moore's P. C. C. 396, reference is made to the statute 25 H. 8, c. 22, as still in force: but this appears to be an oversight; for the arguments had brought to the notice of the Court the repeal of this act by stat. 28 H. 8, c. 7, 1 Moore's P. C. 390, 1.

This large body of authority is in accordance with the canon law. It was shown by an elaborate argument, in *Regina v. St. Giles* in the Fields, ante, p. 173, 200—202, that, by the canon law, not only of England, but of all Europe, and extending over several centuries, a marriage such as this was forbidden. It is no impeachment of the earlier cases, to say that they rest partly on the canon law: canon law made before stat. 25 H. 8, c. 19, and not contrary to the laws of the realm, is valid by sect. 7 of that statute. If the Court entertain any doubt as to the correctness of former decisions, they will yet be legitimately bound by those decisions, and by the understanding known to have prevailed, both in and out of the profession, as to the law on this subject. *Crease v. Sawle*, 2 Q. B. 862, 885, is a strong instance of the weight given to a series of authorities. There even the Court of Exchequer Chamber felt itself bound by a course of decisions of the Court of King's Bench on the rating of mines, though the series relied upon consisted only of four, the earliest *Rowls v. Geis*, 2 Cowp. 451, in 1776.

*It is not unimportant that the law of Scotland on this subject expressly prohibits the marriage in question, as forbidden by the [*226

(a) Yearb. Mich., 20 H. 6, fol. 12 B, 13 A.

law of God: (a) and there are instances even of capital conviction for incest committed with a wife's sister. (b) In a case turning merely on municipal law, as of rights under a bankruptcy or insolvency, there may be no inconsistency in recognising different laws for the different parts of the kingdom: but it would be strange if two cases like the present should come before the House of Lords, and they should be called upon to pronounce that one law of God prevailed in one part of the kingdom, and a second and conflicting law of God in another.

Sir *F. Kelly*, in reply. Before stat. 32 H. 8, c. 38, the common law courts had no power to prohibit the Ecclesiastical Courts in cases of marriage. The statute gave that power where the marriage was "without the Levitical degrees." Thenceforward the real question as to prohibition was, whether the marriage was without the Levitical degrees or not. The decision in *Hill v. Good, Vaughan*, 302, proceeds mainly upon the assumption that a marriage, though not expressly prohibited by Leviticus, c. 18, may still not be "without the Levitical degrees;" a proposition already shown to be unfounded. It is noticed in that case, and was *227] observed in *Regina v. St. *Giles in the Fields*, ante, pp. 186, 193, that the Karaite Rabbis construed the specific prohibitions in Leviticus, c. 18, as giving instances only: but it is conceded that they differed in their construction of the law from other Jewish theologians; and they were not its recognised interpreters. (c) As to the argument from the law of Scotland, the legislature of that country has expressly specified the marriages it meant to prohibit: therefore, in the cases which it is supposed might come before the House of Lords, no difficulty would arise in applying the Scotch law. [Lord DENMAN, C. J. The kind of anomaly suggested is constantly occurring.] To the argument that these marriages are essentially at variance with the law of God, it is a strong answer that the greater number of Christian countries hold them lawful. The validity of Henry the Eighth's marriage with his brother's widow is sometimes supposed to have depended on the question whether or not the former marriage had been consummated; but this is inconsistent with the bull of Julius the Second in 1503, authorizing the marriage of Henry and Katharine, (d) which recites the petition of Henry and Katharine as alleging that the marriage of Katharine with Arthur was perhaps consummated.

Lord DENMAN, C. J. The only point to be decided by this Court is, whether or not the marriage in question be void by the law of England.

(a) See Acts of the Parliaments of Scotland, Jac. VI., A. D. 1567, c. 26 (vol. iii. p. 26, of the edition by the Record Commissioners); ib., A. D. 1590. The Confession of Faith, c. 24 (vol. ix. p. 128, s. 4; Erskine's Institute, Book I. tit. 6, s. 9, p. 123 (ed. 1828)); 1 Stair's Institutions, Book I. tit. 4, s. 4, p. 23 (ed. 1826). See the Trial of Nairn & Ogilvie, 19 How. St. Tr. 1235.

(b) Alison's Principles, p. 564, c. 29, s. 1. 2 Broun's Justiciary Reports, p. 549, note.

(c) On the insufficiency of their authority he cited The "Case of Marriages between near Kindred," &c. (London, 1756.) See pp. 37, 8.

(d) Set forth in 1 How. St. Tr. 320. Proceedings relating to the divorce of Katharine of Arragon.

And that depends entirely on the statute 5 & 6 W. 4, c. 54. (His [*228
 *Lordship here read the first and second sections of the act.) I do not advert to the circumstances under which the act was passed, though I had more than common opportunities of knowing what occurred on that subject, because I then presided in the House of Lords, the Great Seal not being in the hands of a Lord Chancellor.(a) I proceed to look at the statute itself. The second section enacts that all marriages shall be absolutely null and void, which shall thereafter be celebrated between persons "within the prohibited degrees of consanguinity or affinity." What the prohibited degrees are, depends entirely on the statute 32 H. 8, c. 38. That monarch was one who dealt very lightly with his own contracts, and with the principles of justice and humanity. In the 25th year of his reign, he caused an act of parliament (b) to be passed, declaring his marriage with Katharine of Arragon void and their separation effectual: and in that statute was introduced a general clause(c) stating what marriages were to be deemed prohibited by God's law, and not allowable under dispensation. In that enumeration is included the marriage of a man with his wife's sister. Then came stat. 28 H. 8, c. 7, declaring the King's marriage with Anne Boleyn, as well as that with Katharine, void and annulled, and the issue of both marriages illegitimate. In that statute is again contained (s. 11) the same list of prohibited marriages (I do not dwell on the distinction between prohibited marriages and prohibited degrees): and there that most wholesome prohibition is repeated (ss. 12, 13), that such *marriages, forbidden by God's law, shall not be permitted by [*229
 virtue of any human dispensation. The first of these acts was passed chiefly for the purpose of setting aside the King's marriage with Katharine; the second for the purpose of repealing the former act and limiting the royal succession to the King's issue by Jane Seymour. Then followed the act 32 H. 8, c. 38. But stat. 25 H. 8, c. 22, was repealed in the first year of Queen Mary. If the intention of that act (2 stat. 1 Mary, c. 1, s. 8) had been to deny the declaration of prohibited degrees formerly made by the legislature, very simple words would have served the purpose. But that was not done. The marriage of Henry with Katharine was declared good, but on other grounds. The act, which showed the wisdom of the parliament of that time, inferred the validity of the marriage from the many years during which it had subsisted, its prosperity, the offspring it had produced, and the corrupt practices and untrue suggestions by which the divorce had been brought about; the object of the statute being (as its title(d) implies) to affirm

(a) The Great Seal was put into commission, April 23d, 1835, on the resignation of Lord Lyndhurst. See 3 A. & E. 1.

(b) 25 H. 8, c. 22.

(c) Sect. 3.

(d) 'An act declaring the Queen's Highness to have been born in a most just and lawful matrimony; and also repealing all acts of parliament and sentence of divorce had or made to the contrary.'

the Queen's legitimacy and right to the Crown, and not to affect the general rule laid down in former statutes for the marriages of all subjects of the realm, and by which the legislature declared what they took to be the Levitical law, or (in terms considered synonymous) the law of God. One, indeed, of the grounds on which the act of 1 Mary proceeded might be that the marriage between Katharine and Prince Arthur, Henry's brother, was falsely supposed to have been consummated.

*230] *If the only appeal had been to Holy writ, the marriage of Henry with his brother's widow would not have been invalid on that account: but the question of consummation had been made an important one in the proceedings for Katharine's divorce. She herself appealed directly to the King upon it, called him to witness that she had come a virgin to his embraces,^(a) and offered to pledge her oath to the truth of that protestation. Queen Mary, at her accession, held the honour of her mother more important than any other point: and that appears to have been the motive for declaring the legitimacy of her own succession in the terms adopted in 2 stat. 1 Mary, c. 1: a motive wholly irrespective of anything on the subject of future marriages enacted in the great law already referred to, the statute 32 H. 8, c. 38.

This statute, in its object one of the most beneficial ever passed, being intended to abolish the power claimed by the Pope in this country of avoiding marriages on pretence of former contract, and permitting them by dispensation, recited the abuses which had prevailed in these respects, and then laid down the liberal and well considered rule: That "all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry), such marriages being contract and solemnized in the face of the church, and consummate with bodily knowledge, or fruit of children or child being had *231] therein between the parties so married, *shall be by authority of this present parliament aforesaid deemed, judged, and taken to be lawful, good, just, and indissoluble, notwithstanding any pre-contract or pre-contracts of matrimony not consummate with bodily knowledge, which either of the parties so married or both shall have made with any other person or persons before the time of contracting that marriage which is solemnized and consummate, or whereof such fruit is ensued, or may ensue, as afore, and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by act, or otherwise; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." The evil to be cured was the power assumed by the Court of Rome to inquire into the circumstances under which marriages had been contracted, and to confirm or set them aside: it was of no importance at that time to inquire into the

(a) See Cavendish's *Life of Wolsey*, ed. (Singer's) 1827, p. 215 and 214, note 4. Compare Hollinshed, vol. iii. p. 737, ed. 1808, with the statement in the text of Cavendish.

rule which might exist for determining what marriages were or were not prohibited by God's law. That rule had been laid down by former statutes; and I think the prohibition declared by them to be that of God's law is left wholly untouched by the last statute of Henry the Eighth. I found that opinion, not only on the words of the statute, but on its declared object.

The question what marriages were prohibited by God's law remained under that act to be determined by the opinion of the Judges; though the only Judges who would be called upon to decide it at that time were those of the Ecclesiastical Courts, of whom the statute intimates so much jealousy. Yet, to procure certainty in the marriage contract, and to avoid the inconvenience of such disputes as had been complained of, [*232
*the wise and public-spirited men who passed the act were content to trust the Ecclesiastical Judges with the future decision on that point.

It has been argued here that the Judges of the common law courts who may now be called upon to decide these questions must take their rule from the Scriptures. But what Scriptures? If I am called upon to determine what the law of God is, am I to be bound by what a particular translation tells me? We have been occupied here by a discussion of five days, in which as many different interpretations have been put upon the texts under dispute. If any end could be put to such controversies, it would be by calling upon the Spiritual courts to decide them, only leaving it to a Common Law court to interfere, if it became necessary, by prohibition. Are we to talk here of the opinions of the Scribes and Pharisees? to sit as a Court of error from the Karaites and Talmudists? to inquire into the doctrines of the Council of Eliberis? These are curious points, and may occupy men of leisure: but for us to decide upon them would be doing the very thing which the Legislature intended to prevent when it took upon itself to determine what were the prohibited degrees. That has been laid down, rightly or not, by the legislature of Henry the Eighth's time; and their decision has not since been overruled by parliament. To the statutes of that time we must refer, to ascertain what are the prohibited degrees spoken of in the statute 5 & 6 W. 4, c. 54. Looking to the statutes alone, their language, their object, and the mode in which they aim at effecting it, I come to the undoubting opinion that the law of the prohibited degrees is well laid down in the statutes of Henry the Eighth, and that the degrees *there defined are the degrees referred to in the act 5 & 6 W. 4, [*233 c. 54.

In the authorities there is a full and remarkable concurrence. I do not ascribe more weight to the canons of 1603 than did HOBART and Lord HARDWICKE; but the 99th canon is important, as showing the current of opinion and the law deemed to prevail at that day; and it recognises the table of 1563 as containing the then declared law of prohibited

marriages. *Manue's Case*, Moore, 907, S. C. Cro. Eliz. 228, and *Parsons's Case*, Co. Litt. 235 a, have been cited, as showing that the Courts would inquire what was or what was not against the law of God : but they leave that point simply as they found it. The Court, in those cases, made no inquiry but with reference to the construction of stat. 32 H. 8, c. 38. It is remarked that the passage in Co. Litt. containing *Parsons's Case*, was expunged after the first edition. That is a circumstance we cannot now inquire into ; nor is it material. Lord Coke, in the most valuable of his works, has a commentary on the statute 32 H. 8, c. 38, 2 Inst. 688, in which he sets down a table of prohibited degrees as comprehended in that statute, referring to the earlier acts, 25 H. 8, c. 22, and 28 H. 8, c. 7, and showing that he thought men ought to form their opinion of what was prohibited, not upon their individual views of the Scriptures, but upon the plain terms of the statute law. I admit that, although a consultation was granted in *Hill v. Good*, Vaugh. 302, a prohibition went in *Harrison v. Dr. Burwell*, Vaugh. 206. But every one knows that there is no part of the law subject to so much doubt, and on *234] which the *views have been so different in different cases, as the question when a prohibition should be enforced and when not. The mere granting or withholding it may throw little light on the substantial matter discussed. But in *Hill v. Good*, Vaugh. 302, we have the opinion of VAUGHAN, C. J., on the principal point, at full length : and his view agrees with mine, that the marriage in question is against God's law as declared in our statutes. The judgment is given at much length, and is, in many points, open to observation ; but the material result is this. The ground of decision in *Harrison v. Dr. Burwell*, Vaugh. 206, was that the marriage there (of a man with his great-uncle's widow) was "without the Levitical degrees." It is admitted that, from the time when *Hill v. Good* was decided, all authority has gone with the doctrine there laid down. Now it is said that we must set aside the doctrine of that case, because the judgment is grounded on some bad reasons. I think that does not follow. It would indeed have been well if the judgment had not gone through such a variety of topics, entering into the law of the Hebrews and the opinions in *Selden's treatise*, but had simply declared the law as founded on the statute. I think, however, there are passages in which the judgment is put on that ground : and the opinion delivered in it has, confessedly, prevailed ever since. That opinion is not, in my judgment, erroneous : if it were, I should feel bound to say that its foundation failed. But it stands, as I think, upon the right construction of an act of parliament.

This being so, what did stat. 5 & 6 W. 4, c. 54, contemplate ? Was *285] the legislature ignorant of the *construction which had prevailed down to that time ? The preamble speaks of the sentences which have been given by the Ecclesiastical Courts in cases of marriage within the prohibited degrees. Did not the makers of the law know what had,

with reference to such sentences, been deemed prohibited degrees under the statutes of Henry the Eighth? And did not they recognise that construction? When the act recites that "marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties thereto," and enacts that "all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void," are there any considerations of justice or expediency which can warrant us in saying that the legislature did not intend a prohibition grounded upon the statutes?

I am aware that painful instances may be stated, where ignorant persons in the inferior classes of society have contracted marriages of this kind and now find them invalid. Such cases it is melancholy to contemplate. But, as to persons in a higher rank of life, if there are any, who have contracted these alliances since the passing of the late act, they have defied the law, and have no right to complain.

My conclusion is that the judgment below was right; and that the defendant could not be guilty of bigamy, his first marriage having been void. This applies only to Chadwick's Case. On that of Regina v. St. Giles in the Fields we say nothing at present, because our decision in the Case of Chadwick may be appealed from, *and we would [*236 wait the result of that proceeding before we pronounce judgment in a case where there can be no appeal.

COLERIDGE, J. I am of the same opinion. The defendant's case rests on the construction of the statutes; and, if that entitles him to acquittal, we must do him justice, whatever may be the consequence to others. The whole question turns on the meaning of the words "prohibited degrees" in the short act, 5 & 6 W. 4, c. 54. The guide to interpretation must be the statute itself; reference being had to the state of the law when it passed, and the current of judicial decisions at the time. The statute refers, in its preamble, to the decisions of the Ecclesiastical Courts as well known, and assumes that the marriages of which it is about to speak are liable to be set aside in those Courts. It saves those already celebrated, which are not yet brought in suit, that is, litigated in such suits as are known to have been entertained by the Ecclesiastical Courts; but it leaves suits already commenced to take their course, thus continuing the power of the Ecclesiastical Courts to decide judicially on certain past marriages as they have been in the habit of doing. It is idle to suppose that, in clauses framed as these are, the term "prohibited degrees" has a particular meaning in one place and a different meaning in another; and in sect. 2 it is enacted that future marriages within the "prohibited degrees" of consanguinity and affinity shall be null and void.

Let us suppose that, if stat. 32 H. 8, c. 88, were now under [*237 consideration for the first time, we should have *construed it

in the manner contended for on the part of the crown : could we, even then, all other facts remaining as they now are, have given the same construction to stat. 5 & 6 W. 4, c. 54? Must not we have noticed the decisions which have taken place in the mean time? But, when we look to stat. 32 H. 8, c. 38, and construe it on the principle I have applied to the act of W. 4, I think we can have no doubt that the Legislature intended by the earlier statute that which I have supposed them to mean by the later. Much curious historical learning has been shown in the investigation of the older acts; but I think we need not thread the labyrinth of statutes to discover which of the enactments in question has been repealed, or revived, and which has not. We may use the prior acts simply as the best interpreters of stat. 32 H. 8, c. 38, which is clearly in force. This act declares all persons "lawful" for the purpose of marriage "that be not prohibited by God's law to marry." The words "God's law" there may mean more than the Levitical law; they may refer to the state of body or mind. Then it is added "that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees:" and this act, like that of W. 4, points to the decisions of the Ecclesiastical Courts, enacting that no person shall be admitted in any of the Spiritual Courts to any process, plea, &c., contrary to the statute. Now, when "God's law" and "the Levitical degrees" are mentioned in the same branch of an enactment, they cannot mean merely the same thing: it is assumed that God's law, though it includes the Levitical degrees, may prohibit something beyond *238] them. If it were necessary, for the *right interpretation of these terms, used in a statute, to examine into the 18th chapter of Leviticus, we must do so, however painful the inquiry might be on such an occasion: but we could not be assisted in it by any criticism on the now authorized version of the Bible; for it did not exist when stat. 32 H. 8, c. 38, was passed: what translation the Legislature referred to we do not know; probably not to any English translation. We are not, however, on this occasion, inquiring what God's law or what the Levitical law is. If the parliament of that day legislated on a misinterpretation of God's law, we are bound to act upon the statute they have passed. That statute cannot be better interpreted than by reference to the prior ones in *pari materia*: and these, whatever may be said of the tergiversation of parliaments in Henry's time, lay down the rule with great uniformity. Stat. 25 H. 8, c. 22 (ss. 3, 4), takes in succession the degrees mentioned in Leviticus, c. xviii. to verse 18 inclusive, and declares marriages within those degrees to be prohibited by God's laws, though they had been allowed by dispensation; and sect. 4 forbids all persons to marry within those recited degrees. Stat. 28 H. 8, c. 7, goes through the same enumeration (sect. 11; adding, in some instances of the wife's kindred, carnal knowledge of the wife as a condition of the illegality); declares (sect. 12) that marriage within each of these degrees is prohibited

by the laws of God, and, by sect. 13, absolutely prohibits them. Stat. 28 H. 8, c. 16, s. 2, confirms all marriages had in the King's dominions before November 3d, 26 H. 8, of which there has been no divorce by the ecclesiastical laws, and which are "not prohibited by God's laws, limited and declared in the act" 28 H. 8, *c. 7, "or otherwise by Holy Scripture." When, therefore, the act 32 H. 8, c. 38, speaks of [*239 "God's law," without further explanation, and introduces the term "Levitical degrees," can it be doubted that the first expression means the law of God as declared by the three former acts, and the second the very degrees, which are the Levitical degrees, enumerated at length in two of those prior acts?

This is the course of reasoning which might suggest itself if the statute of 32 H. 8 were under consideration for the first time. But, from that period downward, there are few points better established by authorities than that the marriages in question are unlawful. It appears that, in the first two reported cases after the statute, the Courts were disposed to grant a prohibition; but a consultation was finally awarded: the reasons are not distinctly known, and may have been technical. Some observations have been made upon Parsons's Case, Co. Litt. 235 *a*, mentioned in Coke's First Institute, and which is said to have been withdrawn from that work in the third and some subsequent editions. But, in 2 Inst. p. 683, Coke gives a formal exposition of stat. 38 H. 8, c. 38, and, after stating that by Leviticus, c. xviii., "not only degrees of kindred and consanguinity, but degrees of affinity and alliance do let matrimony," he sets forth a table of degrees, including "His wife's sister," and adds, in the margin, "See these degrees truly set down in the stat. of 25 H. 8, c. 22, and 28 H. 8, c. 7." And at the end of the table, he says: "These be the Levitical degrees, which extend as well to the woman as to the man. *And herein note, that albeit the marriage of the nephew cum amitâ et materterâ is forbidden by the said 18th chapter of Leviticus, and by express words the marriage of the uncle with the niece is not thereby prohibited, yet is the same prohibited, quia eandem habent rationem propinquitatis cum eis qui nominatim prohibentur, et sic de similibus." As to the cases in Vaughan, it may, as my Lord has observed, be difficult to sustain some of the arguments in Hill *v.* Good, Vaugh. 302: though I am not sure that, on examination, these would be found objectionable, taking the whole course of reasoning together. But suffice it that, from that time downward, all the Courts, both the temporal and the ecclesiastical (which by our constitution have an original jurisdiction in such matters), have followed the ruling in Hill *v.* Good as to the invalidity of these marriages: and it is too much to ask of this Court, which is not a final but only an intermediate court of error, to reverse so many decisions. I have no doubt that, in Hill *v.* Good, the right interpretation was put upon stat. 32 H. 8, c. 38: and,

if I had only this view of the subject to decide by, I should say that the present judgment was right.

WIGHTMAN, J. The argument upon this most important question was properly commenced by Sir *F. Kelly*, on the part of the plaintiff in error, by referring to the terms of stat. 5 & 6 W. 4, c. 54, upon the effect of which this case depends, and inquiring what the statute meant by the words "prohibited degrees." (His Lordship then read the enacting part of sect. 1, and the whole of sect. 2.)

*241] *The statute does not define the prohibited degrees: and the question is, What do those words mean as used in it? And, also, Do they mean degrees prohibited in terms by the Levitical law, or degrees prohibited by some statute, or degrees prohibited by some canon, or all or any of these, and which? On the part of the prosecution it is said that the prohibited degrees are those which are prohibited by statute; and that the only statute unrepealed which shows what the prohibited degrees are is stat. 32 H. 8, c. 38, by which it is enacted "that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees;" and that the marrying a deceased wife's sister is neither prohibited by the law of God nor within the terms of the Levitical degrees.

If this were a mere abstract question, whether a deceased wife's sister was within the degrees prohibited by the Levitical law, or, by inference, by stat. 32 H. 8, c. 38, I might find more difficulty in coming to a satisfactory conclusion, especially after this argument, and the critical examination which the terms of the Levitical law and of the statute have undergone, than when the question is what are the prohibited degrees referred to in stat. 5 & 6 W. 4, c. 54. In considering, however, the meaning and intention of the legislature in stat. 5 & 6 W. 4, c. 54, it is necessary to look somewhat closely to the object as well as the language of the legislature. The title is "An act to render certain marriages valid, and to alter the law with respect to certain voidable marriages." The recital is: "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court *pronounced during the lifetime of both the

*242] parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be ipso facto void, and not merely voidable." The "prohibited degrees" are mentioned, both in the preamble and the enacting part of the statute, without definition, and apparently as already known and understood. The preamble states that marriages between persons within the prohibited degrees were voidable *only* by sentence of the Ecclesiastical Court. The statute, then, would appear to be intended to apply to those mar-

riages which were voidable only in the Ecclesiastical Court by reason of their being within the prohibited degrees, and which, for the future, instead of being voidable only upon suit in those courts, were to be absolutely void. Upon reference to the law as administered in those courts, appearing by a long series of decisions, too well known to make it at all necessary specifically to refer to them (they were cited in the argument, and have been referred to in the judgments of my Lord DENMAN and my brother COLERIDGE), the marriage of a man with the sister of his deceased wife was voidable, because they were within the prohibited degrees. At the time stat. 5 & 6 W. 4, c. 54, was passed, marriages incestuous because within the prohibited degrees could only be avoided in the lifetime of the parties in the Ecclesiastical Courts. Amongst those which were voidable in the Ecclesiastical Courts, because within the *prohibited degrees, was the marriage of a man with his deceased wife's sister. I do not think it necessary to inquire whether, in [*243 the Ecclesiastical Courts, such a marriage was deemed prohibited by the Levitical law, the statute law or the canon law, or by all of them. It is clear from an unvarying current of authorities that such a marriage was voidable in the Ecclesiastical Courts as within the prohibited degrees, but voidable only during the life of the parties. If not avoided during the life of the parties, it could not be questioned after. This no doubt produced great uncertainty: an unfriendly suit might annul a marriage which the parties themselves would never have questioned, and which, after the death of either, would have been good. If the case had arisen before the passing of stat. 5 & 6 W. 4, c. 54, and a man had married his wife's sister, and afterwards had married another woman in the lifetime of the first wife's sister, the marriage not having been avoided in the Ecclesiastical Court, he would be guilty of bigamy, the marriage being good: but, if the marriage with the wife's sister had been annulled in the Ecclesiastical Courts because within the prohibited degrees, he would not be guilty of bigamy. Now it seems to me that the object of the legislature, by stat. 5 & 6 W. 4, c. 54, was at once to make those marriages void which might be avoided in the Ecclesiastical Courts by a suit, thereby avoiding the hardship of the validity of a marriage remaining unsettled pending a suit, or whilst it was uncertain whether a suit would be instituted or not. It is a statutory avoidance at once of that which might be avoided in the Ecclesiastical Courts: and, if the marriage of a man with his deceased wife's sister would have been avoided by suit *in the Ecclesiastical Courts as within the prohibited [*244 degrees, I think it is void now by the Act of Parliament.

Upon this ground I think the acquittal right, and that the judgment of the Court below should be affirmed.

When this case was before me in the Court below, I did not mean by the judgment I then gave to pledge myself to any definite opinion, as I knew that it was intended that the facts found by the jury should be

made the subject of a special verdict with a view to the question being considered by a court of error. But, as it was necessary that a judgment should be given to found ulterior proceedings, I gave the judgment which at the time I thought right, and which after a careful attention to the argument on both sides, I do not find sufficient reason to alter.

ERLE, J. On ordinary principles of construction, I think that the marriage in question was within stat. 5 & 6 W. 4, c. 54, s. 2. The arguments have been so fully gone into by the rest of the Court that I shall add nothing further.

Judgment affirmed.

No writ of error having been brought in *Regina v. Chadwick*,

Lord DENMAN, C. J., in Easter vacation (May 15th), 1848, delivered the judgment of the Court in *Regina v. St. Giles in the Fields*, as follows.

We think that this case is the same in principle with *Regina v. Chadwick*, and that the particular facts make no difference. We must therefore be taken to decide accordingly.

Orders quashed.

END OF MICHAELMAS TERM.

*MICHAELMAS VACATION.(a)

[*245

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

SYDSERFF and Another v. The QUEEN. Nov. 26.

Indictment, charging that defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" the prosecutor "of his goods and chattels." Held good, on writ of error.

ERROR was brought in the Exchequer Chamber on a general judgment given for the Crown by the Court of Queen's Bench(b) on two counts of an indictment.

The first was a special count for a conspiracy to obtain certain goods of the prosecutor. This count charged false pretences and other overt acts in pursuance of the conspiracy; but, as it was, upon the argument, admitted to be good, further notice of it is unnecessary.

The second count alleged that the plaintiffs in error "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" the prosecutor "of his goods and chattels. To the great damage," &c.

There was the common assignment of errors, and also a special assignment of errors; but the latter did not apply to the second count. Joinder in error.

The case was argued in last Trinity Vacation,(c) *before [*246 WILDE, C. J., COLTMAN, MAULE, and CRESSWELL, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.

Pigott, for the plaintiffs in error. The second count is too general, and is uncertain. It should have alleged that the plaintiffs conspired to defraud the prosecutor by false pretences or undue means; *Rex v. Fowle*, 4 C. & P. 592; *Rex v. Richardson*, 1 M. & Rob. 402; *Regina v. Peck*, 9 A. & E. 686; *King v. The Queen*, 7 Q. B. 795.(d) In *Rex v. Eccles*, 1 Leach C. C. 274, 4th ed.; S. C. note(d) to *Rex v. Turner*, 13 East, 230, it was alleged that the conspiracy was to be effected by "indirect means;" and even in *Rex v. Gill*, 2 B. & Ald. 204, there was an allegation of "divers false pretences, and subtle means and devices." *Rex v. Gill* has, in many cases, and recently in *Regina v. Parker*, 3 Q.

(a) The Court of Queen's Bench sat in Banc during this vacation on November 27th, and December 3d, 4th, and 6th to 11th inclusive.

(b) May 6th, 1844. No motion was made in arrest of judgment, the defendants relying upon its reversal by the Court of Error on the ground that the judgment was general and the second count bad.

(c) June 14th, 1847.

(d) Reversing the judgment of Q. B. in *Regina v. King*, 7 Q. B. 782.

B. 292, 298, been referred to as an instance of the most general form of indictment that has been held admissible; and it is, indeed, overruled by *Rex v. Biers*, 1 A. & E. 327, in which case also the general count alleged "false, artful, and subtle stratagems and contrivances" as the means employed.

Rew, *contra*. The offence charged is the unlawful conspiracy. The means for accomplishing the conspiracy need not be alleged. In *Rex v. Eccles*, it was observed by BULLER, J., that "nothing need to have been stated about the means, for the means are matter of evidence to prove the charge, and not the crime itself. The indictment therefore rather states too much than too little." In *Rex v. Biers*, which is said *247] to overrule *Rex v. Gill*, 2 B. & Ald. 204, it is clear that the Court overlooked the general count altogether, and applied their judgment to the special counts only. *Rex v. Gill* has been distinctly recognised in very late cases; *Regina v. Kenrick*, 5 Q. B. 49; *Regina v. Gompertz*, 9 Q. B. 824, 888.

Pigott replied. [WILDE, C. J. This appears to be a more general form than is found in any of the indictments relied upon for the prosecution. We will consider the case.] *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the Court. The second count of the indictment in this case was objected to as being too general: and *Rex v. Biers*, 1 A. & E. 327, was relied upon in support of the objection, and as overruling *Rex v. Gill*, from which we think the present case not distinguishable. But, upon referring to the judgment in *Rex v. Biers*, there appears strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither *Rex v. Gill*, nor any other authority at all bearing upon the point decided by it was referred to in that judgment; and it appears distinctly from the recent case of *Regina v. Gompertz*, that *Rex v. Biers* has never been considered by the Court of Queen's Bench as overruling *Rex v. Gill*. We are of opinion that this count is good: and judgment must be affirmed.

Judgment affirmed.(a)

(a) Reported by H. De rison, Esq.

*248] *ROBBINS v. FENNELL, CHILD, and KELLY. Nov. 27.

Where a country attorney, who is employed in a cause, employs a London agent, there is not, in general, such privity between the client and the London agent as entitles the client to recover for money had and received, against the agent, in respect of proceeds of the cause which the agent has received in the ordinary course of his business.

But, if it appear that such proceeds have been received by the agent without authority, either from the client or the country attorney, the Court will, if the agent be an attorney of the Court, compel him, upon application, to pay over the proceeds to the client. Though the country attorney be indebted to the London agent in a greater sum on other accounts.

ASSUMPSIT for money lent, money had and received, and on an account stated. Plea: Non assumpsit. Issue thereon.

On the trial, before PLATT, B., at the Wiltshire Summer Assizes, 1846, it appeared that the plaintiff had recovered judgment, in a case of *Robbins v. Heath* and others, upon a warrant of attorney. This judgment had been entered up for the plaintiff by Messrs. Addis & Guy, London attorneys. On 10th May, 1846, Messrs. Slade & Jones, attorneys at Devizes, wrote to the defendants, who were London attorneys, and agents of Slade & Jones, directing them to issue a fi. fa. on the warrant of attorney, to be endorsed, for the principal money secured and interest, 157*l.* 5*s.*, besides, &c., as usual. The letter added: "obtain warrant on the fi. fa. from undersheriff of Wilts's agents in town, and send same by to-morrow night's post to Samuel Hinder, the officer at Melksham; and direct him to come up to us at Devizes, immediately he receives the warrant, for his instructions as to levying," &c.

The defendants accordingly issued the fi. fa., which was endorsed in the name of the defendants "for" Slade & Jones, and sent it to Hinder, with instructions to call upon Slade & Jones before levying. The officer did so; and afterwards he made the levy and sent the *money [249 to the undersheriff. He stated, on the trial, that he had no special instructions to do so. The undersheriff also, without special instructions, but (according to evidence given at the trial) in conformity with the usual practice, forwarded the money to the defendants; which was done by his informing them by letter that Williams, Deacon & Co., of Birchin Lane, were requested to pay them 166*l.* 8*s.*, the amount of the levy; and the defendants drew on Williams, Deacon & Co., and received the amount accordingly. They afterwards refused to pay it to the plaintiff, on the ground that Slade & Jones were indebted to them in a larger sum. No evidence of the debt last mentioned was given at the trial: but the defendants insisted that the plaintiff must be nonsuited for want of privity between him and them. The learned Judge reserved leave to move for a nonsuit: and a verdict was taken for the plaintiff for 165*l.*

In Michaelmas term 1846, *Crowder* obtained a rule nisi for a nonsuit, or a new trial.

Montague Smith and *Taprell* now showed cause. (a) The rule is to be supported on the ground that the privity is, not between the London agent and the client, but between the London agent and the country attorney. But in *Moody v. Spencer*, 2 D. & R. 6, it was decided that the London agent has not, as against the client of the country attorney, a general lien upon the proceeds of a suit for a debt due to such agent from the country attorney. *Cobb v. Becke*, 6 Q. B. 930, will be cited on the other side. There a client had paid money to his attorney in *the country for the purpose of compounding an action; the coun- [250 try attorney had transmitted it for that purpose to his London

(a) Before Lord DENMAN, C. J., COLERIDGE and WIGHTMAN, Js.

agent; and the agent had promised the attorney that he would apply it to the purpose: but it was held that the client could not recover it from the London agent. The Court distinguished that case from *Moody v. Spencer*, 2 D. & R. 6 (which they did not overrule), on the ground that in *Moody v. Spencer*, the money had been received from the opposite party in the action, which was not the case in *Cobb v. Becke*, 6 Q. B. 980. In the latter case the money, having been paid to the country attorney, could not be specifically followed into the hands of the agent. The present case, as to that circumstance, agrees with *Moody v. Spencer*, and differs from *Cobb v. Becke*. *Stephens v. Badcock*, 3 B. & Ad. 354, which may also be cited, is inapplicable: that was merely the case of a clerk who received for his master, and was therefore held not to be liable to an action at the suit of his master's employer, on whose behalf the money had been paid. In *White v. Royal Exchange Assurance*, 1 Bing. 20, it was held that the agent, as against the plaintiff in a cause, could at any rate not retain, out of the proceeds of the suit, more than his own costs in the particular cause, though the attorney was indebted to the agent in a larger sum: and there *RICHARDSON, J.*, pointed out that, if the plaintiff had applied to the agent for the papers, the latter could not have retained them after receiving the amount of his agency thereon. Putting the present case most unfavourably for the plaintiff, and assuming the defendants to have received the money without *authority altogether, still the plaintiff may waive the tort and

*251] treat the money as had and received for his use, as in *Down v. Halling*, 4 B. & C. 330, and *Calland v. Loyd*, 6 M. & W. 26. The action lies, where the specific sum can be traced, against the party who holds the plaintiff's money without right; *Buchanan v. Findlay*, 9 B. & C. 738, 747, *Clark v. Gilbert*, 2 New. Ca. 343, 357, 358, *Littlewood v. Williams*, 6 Taun. 277. [*WIGHTMAN, J.* Do you say that all money is ear-marked which can be traced to a particular account?] If a particular sum be paid and received on a particular account, it may be followed. The money here ought perhaps, in strictness, not to have been received by the defendants at all: but it clearly was received as the money of the plaintiff. The sheriff, after the levy, might have been sued for money had and received. The defendants set the process in motion; and the money obtained was, according to the ordinary practice, remitted to them. The sheriff did not pay the money to them as agents to *Slade & Jones*. It cannot be said that there is no privity between the London agent and the party to the action. The party is bound by the acts of his attorney's town agent; *Griffiths v. Williams*, 1 T. R. 710: it is true that, if one attorney employ another, it may be shown that the credit was given to the former, and not to his client; *Scrace v. Whittington*, 2 B. & C. 11: but here there was no such proof. [*WIGHTMAN, J.* In *Williams v. Everett*, 14 East, 582, a party transmitted bills to the defendants, with order to pay a part of the proceeds to the plaintiff, who was

that party's creditor; the defendants got the bills cashed, but refused to act on the order to pay the plaintiff: and it was held that the plaintiff *could not recover for money had and received, for want of pri- [*252 vity.] There are many cases in which a party, receiving money which he admits to be paid on account of another, has been therefore held liable to that other for money had and received; *Lilly v. Hays*, 5 A. & E. 548, is one. [WIGHTMAN, J. Suppose the defendants here had been insolvent: could not the plaintiff have sued Slade & Jones?] Last term, the Court of Exchequer, in a case of *Hanley v. Cassem*, post, p. 255, compelled a London agent to pay over to the plaintiff in the suit money received by the agent as agent to the country attorney, though there had been a settlement of account, including this money, between the country attorney and the agent; ALDERSON, B., saying that the agent must be treated as agent for the party to the action. In cases where, in default of notice, the agent would be held to act for the party immediately employing him, circumstances which indicate that such party held himself out as an agent to prevent the party employed from enforcing, as against the ultimate principal, a lien which would otherwise be good between himself and his immediate employer; *Maanass v. Henderson*, 1 East, 335. It is no answer that the defendants could not have sued the plaintiff for their work and labour. If a sub-agent, employed without the knowledge or consent of the principal, obtain money belonging to the principal, he cannot, as against the principal, retain it: yet he cannot sue the principal for commission or disbursement; *Story's Commentaries on the Law of Agency*, s. 287 (p. 486, 3d ed. Boston, 1846). But, further, as is there shown, the usage of trade may create a direct privity: and here the employment of a *London agent by a country attorney is a practice so well recog- [*253 nised that the defendants might have a claim against the plaintiff for the particular employment, and be liable to him in respect of such privity. If the receipt of the money be authorized, there is a privity between the plaintiff and defendants: if it be tortious, the plaintiff, simply as owner of the money, may waive the tort, and recover in this action. It is true that, in *Yates v. Freckelton*, 2 Doug. 623, it was held that, though payment to the attorney of a party be payment to the party, payment to a person employed by the attorney is not. [WIGHTMAN, J. That was not an action for money had and received.] And the decision does not show that the principal there might not have adopted the receipt: *Buller v. Harrison*, 2 Cowp. 565, and *Goode v. Jones*, 1 Peake's N. P. C. 177, are examples of such an adoption; the latter is the case of a sub-agent: *Vernon v. Hanson*, 2 T. R. 287, is an instance of a party precluding himself, by his own conduct, from such an adoption. [WIGHTMAN, J. It is difficult to reconcile *Goode v. Jones* with *Cobb v. Becke*, 6 Q. B. 930. COLBRIDGE, J. Is it lawful for the town agent to pay the money to the country attorney?] Not if the authority to do so be

countermanded by the principal : otherwise, there is an implied authority to follow the usual practice of the profession.

Crowder (with whom was *Butt*), *contrà*. There is no privity between the plaintiff and defendants. *Bamford v. Shuttleworth*, 11 A. & E. 926, *254] and *Stephens v. Badcock*, 3 B. & Ad. 354, *show it to be at least a general rule that money had and received cannot be maintained by a principal against a party employed by his agent. The only question here is, therefore, whether the present case forms an exception to the rule : and the only ground for so contending is the decision in *Moody v. Spencer*, 2 D. & R. 6. That case is reported only in *Dowling & Ryland* ; and it is doubtful whether it be law. In *Cobb v. Becke*, 6 Q. B. 930, indeed, the Court were unwilling to overrule it expressly, but they took a distinction which is applicable here. The suit here was not conducted by the defendant ; after judgment had been entered up, they were first applied to by *Slade & Jones* for the mere purpose of putting the under-sheriff in motion by means of a *fi. fa.* A payment to *Slade & Jones* would have been rightful. In *Hanley v. Cassam*, *post*, p. 255, the question arose, under special circumstances, upon a summary application against an attorney. But here the question relates to an action for money had and received. [Lord DENMAN, C. J. We will not call upon you to argue further at present. We will inquire of the Barons of the Exchequer respecting *Hanley v. Cassam*.] *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (11th December), delivered the judgment of the Court.

This case appeared to us, after it had been fully argued, to be almost identical with *Cobb v. Becke*, which we distinguished, in delivering our opinion, from *Moody v. Spencer*. The distinction is not, perhaps, a very *255] satisfactory one ; but, if these two cases are at *variance, we give the preference to that which is not only much later in point of time, but which underwent much greater consideration.

We delayed our decision because the Court of Exchequer was said to have recently taken a different view of the general doctrine, which is undoubtedly of very great importance. And we have made inquiry on the subject, and are indebted for a report of the proceeding in *Hanley v. Cassam* (a) to the last number of *The Law Times*, (b) which we have reason to think correct. This is the marginal note. "Where a London agent has been instructed by the attorney in the country to commence an action, and he receives the money from the defendant in the suit, but instead of paying it over in cash to the country attorney, puts it to his account, which is afterwards settled, the Court will, nevertheless, compel the London agent to pay the money again to the principal (the plaintiff in the action), as the payment to the London attorney is a payment to him in the character of an attorney and as the agent of the plaintiff."

(a) Decided in the Court of Exchequer, November 25th, 1847.

(b) *The Law Times* for December 4th, 1847, vol. x. No. 244, p. 199.

We can easily conceive the town agent making himself liable to the client for particular sums, and that the Court may be desirous of inferring such liability from circumstances, for the purpose of exercising its summary jurisdiction over its officers to enforce justice according to the equity of each individual case. But, when the client, as in this case, appears as plaintiff in an action for money had and received, and the defendant pleads *Non assumpsit*, there can be no recovery unless the law will imply a contract to pay on request from *the relation which [*256 the several parties bear towards each other. The client employs the attorney, is answerable to him for costs, and, in case of negligence or misconduct, must come upon him for redress. He is entitled to credit for all sums the attorney may happen to owe him; and, though he probably knows that the business must be carried on by a town agent, his payment for it to such agent is no discharge to him against the attorney; *Yates v. Freckleton*, 2 Doug. 623. In like manner the attorney employs, and is liable to, the town agent, who knows nothing of the client but his name, and is not even to that extent known by him. The town agent could not maintain an action for work and labour against the plaintiff, by whom he was *not* employed; and the rights and liabilities of the parties in such a case would be reciprocal.

Some expressions fell from Lord HARDWICKE,^(a) which describe the mutual relation of the three characters very clearly. The six clerk in Chancery refused to file a certificate till his fees were paid; but his lordship mentioned an order which establishes "that the six clerk cannot come on the client or solicitor, but must on the sixty clerk, for his fees." "With him" (the sixty clerk) "is the client or solicitor to have privity or connexion: so that payment to him is conclusive to the six clerk; and he is not obliged to pay twice, having paid the proper hand. The practice since has been, that the sixty clerk has taken on him to pay the six clerk; between whom and the client all intercourse is cut off."

This being the state of things, as one of two innocent *parties [*257 must suffer by the misconduct of a third, and we are driven to inquire where the legal liability resides, we cannot help saying, in conformity to former cases, and to the principle of *Williams v. Everett*, 14 East, 582, so often lately recognised, that it results from the privity existing between the two parties. It is remarkable that the decision from which we find ourselves compelled to dissent appears to have been made without reference to the late case of *Cobb v. Becke*, 6 Q. B. 930, or any other authority.

Rule absolute.^(b)

^(a) *Taylor v. Lewis*, 2 Ves. sen. 111. The language appears to be that of counsel. See S. C., 3 Atk. 727.

^(b) *ROBBINS v. HEATH* and Others. Jan. 31, 1848.

MONTAGUE SMITH, in Hilary term, 1848, obtained a rule calling upon Messrs. Fennell, Child & Kelly, attorneys of this Court, to show cause why they should not pay over to the plaintiff the sum of 166*l.* 3*s.*, after deducting the amount of their costs in this action; and also pay the costs of this application.

The affidavits, on which the rule was obtained, stated the facts as mentioned in the report of *Robbins v. Fennell* (supra), with the following additions. On 16th May, 1846, Slade & Jones applied by letter to the under-sheriff for the money; and he, by letter of 18th May, answered that the amount "was forwarded to Messrs. Fennell & Co., your agents." A letter, dated May 18th, of which the following is an extract, was written by Fennell & Co. to Slade & Jones.

"Robbins v. Heath and Others.

"Dear Sirs,

"We had remitted to us, through Williams & Co., the sum of 166*l.* 3*s.* Let us know what we are to do with the money remitted to us by the under-sheriff."

On the 26th of May, the plaintiff, having applied for payment to Slade & Jones without avail, sent to London Mr. Norris, an attorney of Devises, who had interviews both with Fennell, Child & Kelly, and with Slade. Slade, as attorney for the plaintiff, demanded the money of Fennell, Child & Kelly, refused to allow its appropriation to his own agency account, and denied that the under-sheriff had any authority to transmit it to them. Finally, they refused to pay the money to Norris, upon his express demand. Slade had subsequently left Devises; after which he had become insolvent, and was not now to be found.

*In answer, it was deposed that Slade & Jones were indebted to Fennell, Child & Kelly in an amount far exceeding 166*l.* 3*s.*, and had been applied to by letter for a remittance on account of the balance; which, however, they had not made. That Fennell, Child and Kelly afterward (May 23d) wrote the following letter to Slade & Jones.

"Dear Sirs,

"We are really surprised at your asking us to remit the amount received in this matter. We have applied it in part liquidation of the large balance due from you, and therefore cannot think of remitting any portion of it."

The plaintiff was an entire stranger to Fennell, Child & Kelly.

Crowder and Butt now showed cause. This is an attempt to obtain a reversal of the decision in *Robbins v. Fennell* (supra). The Court there, after fully hearing counsel for the plaintiff, decided against him on the ground that there was no privity between him and Fennell, Child & Kelly. In *Ex parte Jones*, 2 Dowl. P. C. 161, *TAUNTON, J.*, refused to comply with a summary application by a client against his attorney's London agent, and said: "Granting that the agent is ever so wrong, there is no privity between him and the client." *PATTERSON, J.*, acted on the same ground in *Gray v. Kirby*, 2 Dowl. P. C. 601, where the London agent was charged with having received money improperly. *Cobb v. Becke*, 6 Q. B. 930, was adhered to by this Court in *Robbins v. Fennell* (supra).

Montague Smith and Taprell, contra. The Court, in that decision, expressly distinguished the case of an action from that of a summary application against an attorney as an officer of the Court. [Lord DENMAN, C. J. We did not mean to make any distinction in favour of a summary application, except in the case of fraud.] The facts here show that which is tantamount to fraud. The money was paid to the agents by mistake: they did not at first claim to hold it for Slade & Jones: but afterwards they attempted to apply it to a debt owing to themselves from Slade & Jones. In such cases the Court exercises a summary jurisdiction over its attorneys; in the *Matter of Oliver*, 2 A. & E. 620. The Court will interfere when stewards of a manor have received documents relating to the manor from former lords. So, where an articulated clerk is equitably entitled to a return of part of the premium. Though no action would lie, it is enough for the present purpose that the agents have obtained the money in their character of attorneys; but for that character, it would not have been transmitted to them. As mere agents they had no right to receive the money owing to the plaintiff; payment of money so received is not payment to the plaintiff; *Yates v. Freckleton*, 2 Doug. 623. *Gray v. Kirby*, 2 Dowl. P. C. 601, shows that the country solicitor is liable to the client for money improperly received by his

*259] agent; but not that the agent can retain such money. In *Ex parte Jones*, 2 Dowl. P. C. 161, the application was made on the ground of negligence in the London agent: there could be no pretence for such an application by the client who had not employed him.

Lord DENMAN, C. J. I think this is one of the cases contemplated in our former judgment. The money did not come to the hands of Messrs. Fennell, Child & Kelly in their character of London agents to Slade & Jones: it was sent to them by the undersheriff, out of the regular course of business. They do not tell us what answer they received to their inquiry from Slade & Jones, what they were to do with the money received: but, in their reply to that answer, they say only that they are surprised that Slade & Jones require the money to be transmitted to them. The money, therefore, must be considered to be accidentally received; and Fennell, Child & Kelly had no right to apply it in satisfaction of the balance between themselves and Slade & Jones. My only doubt has been, whether, as a trial has already taken place in which the matter

has been discussed, we ought not, instead of interfering summarily, to allow the question to come on by means of a new action. I think, however, that we must say a case is here made out in which an attorney of this Court has deprived a plaintiff of his money by improperly applying it.

PATTON, J. If this were simply the case of money received by a London agent in the ordinary course of business, and not under any special circumstances creating a liability, I should think there was no distinction between an action for money had and received and a summary application. But here the money comes to the agent's hands only because the undersheriff does not like to keep it, and therefore sends it up to the person who issued the writ. It is very remarkable that the agents do not state to us the answer they got to their inquiry, what they were to do with the money. All we find is, that they say they were surprised at being asked by Slade & Jones to refund it. It is clear, therefore, that Slade and Jones did not assent to the money being placed to the account between themselves and Fennell, Child & Kelly. The facts before us distinguish this from the former case, in which the nonsuit was right.

COLERIDGE and WIGHTMAN, J_s, concurred.

LORD DENHAM, C. J., added: I do not say that an action for money had and received might not, upon the facts now disclosed, be maintained, although there be no privity, on the ground that Fennell, Child & Kelly had improperly received the money of the plaintiff. Rule absolute.

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Mandamus, to the mayor of D., recited that D. was a borough mentioned in sched. (A) of stat. 5 & 6 W. 4, c. 76; that, on 5th September, 1844, the "overseers of the poor of the parish" of C., part of which was within the borough, made, signed, and delivered to the town clerk, a list of persons entitled to be enrolled in the burgess roll in respect of property within that part of C.; that L., on the last day of August, 1844, occupied a house within the borough, and within that part of C., and had occupied it during all 1842, 1843, and so much of 1844 as preceded 1st September; and, during the whole time of such occupation, was an inhabitant householder, &c.; and continued to occupy and be an inhabitant householder until and upon 5th September, 1844; and "had been rated, in respect of the said premises," so occupied, &c., "to all rates made for the relief of the poor of" C., "during the time of his occupation as aforesaid;" and "had, before the said last day of August," 1844, "paid all such rates, including therein all borough rates directed to be paid under the provisions of" stat. 5 & 6 W. 4, c. 76, "as had become payable by him in respect of the said premises, except such as had become payable within six calendar months next before the said last day of August," &c.: that, on 5th September, 1844, "the said overseers" inserted L.'s name on the said burgess list, as a person entitled, &c., in respect of property within that part of C.: that a Court was holden to revise the burgess list, before W., the then mayor of D., and the then assessors, when the burgess list, so made out by the said overseers, was produced, and the said mayor expunged the name of L. from the said burgess list; by reason whereof the name of L. "hath not been enrolled in the burgess roll of the said borough for this year:" whereupon L., before the end of the term next following, applied for a mandamus to the mayor for the time being to insert the name of L. on the burgess roll. And the Court "having inquired into the title of" L. "to be so enrolled, do command you, the mayor" of D., "to insert the name of" L. "upon the burgess roll of the said borough for this year," or show cause to the contrary: teste, 31st January, 1845.

Return, of 15th April, 1845, by W., (a) the same mayor. (1.) That, before and at the time of the making and signing the said list, there were two overseers of the poor of the parish of C., who were the overseers in the writ mentioned; and that they, and no other person, made and signed the list; that, at the time of making the list, there were two churchwardens of C., neither of whom made out and signed the list, or interfered in so doing; and that there was no other burgess list for C. (2.) That L. had not, before the last day of August, 1844, "paid all such rates as in the said writ in that behalf mentioned, including therein all borough rates directed to be paid under the provisions of" stat. 5 & 6 W. 4, c. 76, "as had become payable by him in respect of the said premises in the said writ in that behalf mentioned, except such as had become payable within six calendar months next before the said last day of August," as alleged in the writ. (3.) That a sum, to wit, 4s., being so much of a certain borough rate for the borough, heretofore, to wit, on 6th February, A. D. 1843, made and directed to be paid under the provisions of the same last-mentioned act, as had become payable by him in respect

(a) See post, p. 264, note (a).

of the said premises so by him occupied as in the writ mentioned, and which had not become payable within six calendar months next before the said last day of August, and which had become payable by him in respect of the same premises on a day before the commencement of the said six calendar months, to wit, on 1st May, 1843, was, on and after the said last day of August, 1844, wholly due and unpaid, and was then and afterwards, and until and upon and after 5th September, 1844, in arrear from L. "For which said causes I" "have not inserted, nor ought I to insert, the name," &c.

1. Admitted, that the time of making the rate mentioned in the third part of the return sufficiently appeared, though laid under a *videlicet*. On special demurrer.
2. Held, by the Court of Queen's Bench, that the first part of the return was bad on general demurrer, the mayor not being entitled to rely on the general badness of the burgess list, after having, as appeared by the writ, treated it as valid by expunging a single name therefrom. Also, that the defect (supposing it to be one) in the signing of the burgess list did not, in itself, furnish an answer to the writ.
3. Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Q. B., that the second part of the return was good, though specially demurred to for generality and uncertainty, inasmuch as it directly traversed the corresponding allegation of title in the writ. Though it did not appear by the record that L. had been objected to on the revision.
4. Held, by the Court of Q. B., that the third part of the return was bad on special demurrer, for not giving the date nor specifying the nature of the rate there mentioned.

Quære, per Lord DENMAN, C. J., where a party applies to have his name inserted in the burgess roll under stat. 7 W. 4 & 1 Vict. c. 78, s. 24, whether the Court, if satisfied of his title upon affidavit, ought not to award a peremptory mandamus in the first instance.

MANDAMUS to the Mayor of Dover.

Whereas the borough of D. is one of the boroughs mentioned in schedule (A.) annexed to an *Act, &c. (5 & 6 W. 4, c. 76): and
 *261] whereas we have been given to understand, &c., that heretofore, and after the passing of the said act and of a certain other Act, &c. (7 W. 4 & 1 Vict. c. 78), that is to say on 5th September, 1844, "the overseers of the poor of the parish" of Charlton in the county of Kent, which parish "was and is in part within the said borough," did duly make out an alphabetical list called "the burgess list," according to the form No. 1, in schedule (D.) to the first-mentioned act, of all persons who were entitled to be enrolled in the burgess roll of that year in respect of property within such parish, that is to say, in that part of the parish which was within the borough; "and that the said overseers did then sign such list, and deliver the same to the town clerk of the said borough, on the said 5th day of September," &c., according to the directions of the first-mentioned Act: And whereas we have been further given, &c., that John Langley, on the last day of August in the said year, 1844, "occupied a house within the said borough, and within that part of the said parish of Charlton which was and is within the said
 *262] borough, *and that the said John Langley, on the said last day of August," 1844, "had occupied the said house during the said year of our Lord 1844, and the whole of the two years immediately preceding the said year," 1844; "that is to say, during the whole years of our Lord 1842 and 1843, and the whole of that part of the said year of our Lord 1844 which preceded the first day of September in the said last-mentioned year; and that the said J. L., during the whole time of such occupation, was an inhabitant householder within the said borough,

and within that part of the said parish," &c., "and was a male person of full age," &c.: "That the said J. L. continued to occupy the said house, and to be an inhabitant householder within the said borough, upon the said last day of August," 1844, "and from thence until and upon the said 5th day of September, in" 1844; "and that the said J. L. had been rated, in respect of the said premises so occupied by him within the said borough, to all rates made for the relief of the poor of the said parish of Charlton, wherein the said premises were situate, during the time of his occupation as aforesaid; and that the said J. L. had before the said last day of August," 1844, "paid all such rates, including therein all borough rates directed to be paid under the provisions of the said first-mentioned Act of Parliament, as had become payable by him in respect of the said premises, except such as had become payable within six calendar months next before the said last day of August; and that the said J. L. was not, nor is, an alien; and had not within twelve calendar months next before the said last day of August," 1844, "received parochial relief, or other alms," &c.: That, on the said 5th September, *1844, "the said overseers inserted the name of the said J. L. [*263 in the said list called 'the burgess list,' so made out by them as aforesaid, as a person entitled to be enrolled in the burgess roll of the said borough of that year, according to the provisions of the said first-mentioned act, in respect of property within the said parish of Charlton, that is to say, within that part," &c.: "That a Court was duly holden, on the 14th day of October, 1844, for the purpose of revising the burgess lists of the said borough, by and before William Clarke, Esquire, then being the mayor of the said borough, and" &c. (an assessor and deputy assessor duly chosen and appointed); "and that the said Court was duly adjourned to, and holden by adjournment on, the 15th day of October," 1844: "That, at such Court so holden as aforesaid, the said burgess list, so made out as aforesaid by the said overseers of the poor of the said parish of Charlton, was produced; and that the said mayor of the said borough, at the said Court so holden as aforesaid, expunged the name of the said J. L. from the said burgess list; and did, in open Court, write his initials against the name of the said J. L. so struck out as aforesaid; by reason whereof the name of the said J. L. hath not been enrolled in the burgess roll of the said borough for this year: In contempt," &c.: Whereupon J. L., "before the end of the term then next following, that is to say, in Michaelmas term last past, applied to us in our Court before us at Westminster for a mandamus to the mayor for the time being of the said borough to insert the name of him the said J. L. upon the burgess roll of the said borough," &c. "And we, being willing," &c., "and having inquired into the title of *the said J. L. to be so enrolled, do command you, the mayor of the said borough of Dover in our said county of Kent, firmly enjoin- [*264

ing you, that, immediately after the receipt of this our writ, you do insert the name of the said J. L. upon the burgess roll of the said borough for this year, according to the directions of the statute," &c.; "or that you show us cause:" &c. Tested 31st January, 8 Vict. (1845).

The return, by William Clarke, mayor of the borough,^(a) was of 15th April, 1845. It stated:

"That, before and at the time of the making out and signing the said alphabetical list in the said writ mentioned, there were two overseers of the poor of and in the said parish of Charlton, in the said writ mentioned, being substantial householders of and in the said parish of Charlton, theretofore duly nominated and appointed as such overseers of the poor of the said parish, according to the form of the statute in that behalf made and provided, to wit, one Stephen Wright and one Henry Pepper; and that they, the said S. W. and H. P., were the overseers in and by the said writ mentioned; and that they, the said S. W. and H. P., and no other person or persons whatsoever, made out and signed the said alphabetical list in the said writ mentioned; and the making out and signing of the said list by the overseers, in the said writ mentioned, was the said making out and signing by the said S. W. and H. P. And *265] that before, and at the time of the *making out and signing the said alphabetical list, there were two churchwardens of and in the said parish theretofore duly elected and sworn in, to wit, one Edmund Lawrence Lyne and one Matthias Rigden Kitham; and that the said E. L. L. and M. R. K. did not, nor did either of them, ever make out or sign the said alphabetical list; nor were they, or either of them, in anywise concerned, nor did they or either of them at all interfere, or take any part, in making out or signing the said list, or cause any person or persons to make out or sign the same; that the same were made out and signed by the said S. W. and the said H. P. only: and no other alphabetical or other burgess list for the said year of our Lord 1844 was made out or signed by any overseer or overseers, or by any churchwarden or churchwardens, of the said parish of Charlton.

"And I do further humbly certify," &c., "that the said John Langley, in the said writ named, had not, before the said last day of August, A. D. 1844, paid all such rates as in the said writ in that behalf mentioned, including therein all borough rates directed to be paid under the provisions of the said Act of Parliament in the said writ first mentioned, as had become payable by him in respect of the said premises in the said writ in that behalf mentioned, except such as had become payable within six calendar months next before the said last day of August, A. D. 1844, as in and by the said writ in that behalf above alleged and supposed.

And that a certain large sum of money, to wit, seven shillings, being

(a) It was assumed by the Court, and not denied by counsel, that the party making the return was the mayor, who, as alleged in the writ, revised the lists in October, 1844. There was no express allegation to that effect; but the names were the same.

so much of a certain borough rate for the said borough of Dover, heretofore, to wit, *on the 7th day of February, A. D. 1842, made and directed to be paid under the provisions of the same last-mentioned act, as had become payable by him the said J. L. in respect of the said premises so by him occupied as in the said writ mentioned, and which had not become payable within six calendar months next before the said last day of August, and which had become payable by him in respect of the same premises on a day before the commencement of the said six calendar months, to wit, on the 1st day of May, A. D. 1842, was, on and after the said last day of August, A. D. 1844, wholly due and unpaid, and was then in arrear from the said J. L. And that a certain other large sum of money, to wit, four shillings, being so much of a certain other borough rate," &c.: allegations corresponding with those as to the rate before mentioned, but giving, as the date of making, to wit, 6th February, 1843; and stating the amount to be payable, to wit, on 1st May, 1843; and that it "was then, and afterwards, and until and upon and after the 5th day of September, A. D. 1844, in arrear from the said J. L. For which said causes, I, the said mayor of the said borough of Dover, have not inserted, nor ought I to insert, the name of the said J. L. upon the burgess roll of the said borough for this year, as in and by the writ I am commanded."

Demurrer, assigning for causes: That the mayor hath returned that J. L. had not, before the last day of August, 1844, paid all such rates as in the said writ, &c. (following the words of the return immediately preceding the statement respecting the rate of 7th February, 1842); which is too general and uncertain, and no definite or proper issue can be taken thereon; and, if *W. Clarke intended to rely on non-payment of any rate, he should have specified such rate, and when and by whom and for what purpose it was made, and in what sum, and in respect of what property, J. L. was assessed therein, and when such rate was payable, and should have given some certain description of the rate, &c., so that J. L. could have traversed the same. Also, that the return does not state by whom the borough rate in the return first mentioned was made, or under what circumstances, or how, the seven shillings became payable by J. L. in respect of the said premises. Also, for that it does not appear, except under a videlicet, when the said borough rate was made and directed to be paid. Also that it does not appear that J. L. ever was assessed in or by the said borough rate, or that the portion of it alleged to have become payable by J. L. ever was ascertained or fixed in or by the said borough rate, or otherwise: that by law no portion of the said borough rate could become payable by J. L. in respect of the said premises; nor could J. L. have been assessed in or by the said borough rate in any sum of money whatever, or otherwise become liable to pay any fixed or definite portion thereof. Similar

causes of demurrer were assigned in respect of the averment as to the rates secondly and lastly mentioned in the return.

Joinder in demurrer.

The demurrer was argued in the Queen's Bench in Easter term,^(a) 1846.

Peacock, for the Crown. The first part of the return professes to answer the writ by the allegation that the *churchwardens did *268] not sign the burgess list. Sect. 15 of stat. 5 & 6 W. 4, c. 76, mentions the "overseers" only. But, further, the mayor, as appears by the record, has revised the lists, as burgess lists, according to sect. 18. He cannot now object to the lists as generally bad; but must show why he dealt with them as he admits, by striking out the name of Langley. As to that, it does not appear that any one objected to the name; and sect. 18 enacts that the mayor "shall retain on the said lists the names of all persons to whom no objection shall have been duly made.

The Court then called on

Crompton, for the defendant. The defendant is entitled to judgment, if any one of the three parts of the return be sufficient. As to the first, the existence of the burgess list is suggested in the writ, in order to show the prosecutor's right to apply for a mandamus, under stat. 7 W. 4 & 1 Vict. c. 78, s. 24. He is bound to establish such title affirmatively; *Regina v. The Mayor of Harwich*, 8 A. & E. 919: and the title so asserted is traversable; *Rex v. Williams*, 8 B. & C. 681, 683, per PARKE, J. [PATTERSON, J. It is obvious that this part of the return is groundless: the mayor, if he had relied on such an objection, would have struck out all the names in the list.] *Regina v. The Mayor of Harwich* shows that the mayor here is not estopped from taking the objection. It was there decided that the party seeking to have his name inserted on the burgess roll, under stat. 7 W. 4 & 1 Vict. c. 78, s. 24, must make out a good title, *269] *independently of what took place at the revision: it is not enough to show that the mayor acted wrongly at the revision; the applicant must show a present right in himself. It is possible that he may have a right, in spite of the badness of the list: but he has made the goodness of his list essential to his title, and can recover only secundum allegata et probata. Now sect. 15 of stat. 5 & 6 W. 4, c. 76, requires that the overseers should sign the lists; and there must, under this clause, be at any rate a signature by the majority; *King v. Burrell*, 12 A. & E. 460, affirmed in *King v. Share*, 3 Q. B. 31. But, by stat. 48 Eliz. c. 2, s. 1, the churchwardens are overseers, together with four, three or two (here there are two only) householders. [PATTERSON, J. I suspect the legislature, when stat. 5 & 6 W. 4, c. 76, was passed, forgot that the churchwardens were overseers.] By sect 142 of that statute, "the words 'overseers of the poor' shall be construed to mean all persons who execute the duties of overseers of the poor." In *Regina*

v. The Justices of Cambridgeshire, 7 A. & E. 480, it was decided that a notice of an application for an order of maintenance, under stat. 4 & 5 W. 4, c. 76, ss. 72, 73, must, where the parish has two churchwardens and two householder overseers, be signed by three of the four. [PATTESON, J. What an iniquitous thing you make your client do! You make him strike out a single name because the whole list is bad.] The question is, whether the prosecutor now makes a title: the mayor may have decided on a wrong ground: but *Regina v. The Mayor of Harwich*, 8 A. & E. 919, shows that this is not the real *question now before the Court. The mayor is showing cause why he does [*270 not now insert the name in the roll. The second part of the return traverses in terms a part of the alleged qualification upon which the prosecutor relies for title, namely, the payment of rates, under sect. 9 of stat. 5 & 6 W. 4, c. 76. The words "all such rates" there do not relate backward, as has sometimes been supposed,(a) but are connected with the words following, "as shall have become payable by him in respect of the said premises." [PATTESON, J. The mayor could not strike out without an objection being made; and none appears.] The return at this part traverses an allegation made essential to the title. [PATTESON, J. But how do you show a justification of the striking out?] It is not necessary: the question is between the prosecutor and the public, or the body of burgesses, not between the prosecutor and the mayor. If the allegation so traversed be omitted, the title relied upon disappears. The complaint is, not that the name has been omitted without an objection made, but that it has been omitted when there was the particular title described. [PATTESON, J. You say that a mayor may strike out any name without objection made, and then on the return to the mandamus rely upon any flaw which he can discover. That cannot be right.] It is so on this form of proceeding. As to the traverse: any other mode of pleading would make it necessary to allege, in order to deny the title set out, new matter of a multifarious kind, describing perhaps a great number of rates, with all the circumstances relating to them: an instance of such diffuse statement occurred, in the case of a single rate, in the return in **Regina v. The Mayor of New Windsor*, 7 Q. B. 908; where the [*271 special allegation was held bad, but the general traverse good. The return, at this part, offers a less cumulative issue than "non fuit electus," which is a good answer to the suggestion of an election in a mandamus. The suggestion here is rather more limited than a general suggestion of "duly elected;" and the traverse, accordingly, is more limited than "non fuit electus." If the suggestion had been general, that the prosecutor was "duly qualified," that might have been traversed by a return that he was "not duly qualified." To describe the rate more particularly would be an argumentative traverse. [WIGHTMAN, J. Suppose performance of condition be pleaded to an action on a bond, can

(a) See judgments in *Regina v. The Mayor of Lichfield*, 2 B. B. 693.

the replication deny performance generally?] A breach of any one condition makes the bond single: the plaintiff therefore points out which part he insists upon, in reply to the general averment of performance; in the case of a qualification, the defendant is entitled to call upon the prosecutor to prove the qualification insisted upon in the first instance. The pleading here is sufficiently certain; and it is certainty, rather than particularity, which is required in pleading. The objection to the *vide licet* cannot be sustained; the allegation does not become immaterial by the addition of this form; note (2) to *Skinner v. Andrews*, 1 Wms. Saund. 170. [*Peacock*. That point is not pressed.] Lastly, if it be necessary to describe particularly the rates which have not been paid, that is done in the third part of the return, where the words follow the language of stat. 5 & 6 W. 4, c. 76, s. 9, with addition of dates and sums. A borough rate can be but of one kind: it cannot be *necessary to go through *272] every step which is to be taken before the rate upon the individual is fixed. It is, indeed, said in the writ that the house occupied by the prosecutor was in that part of the parish of Charlton which is within the borough; but there is no allegation that any part of the parish is without the borough; so that no question arises as to a sub-rate having been made for part of the parish.

Peacock, in reply. First, it is true that the question is, whether the mayor should now insert the name: but he is not the less estopped, by his own former act, from denying the goodness of the list. In *Regina v. The Mayor of Lichfield*, 1 Q. B. 453, a party's name was inserted on the burgess roll, upon mandamus, though there had been no burgess list at all. On the other hand, a name once on the list must be retained if no objection be made. Secondly, as to the general traverse in the return. The prosecutor could not suggest, generally, that he was qualified; that would have been averring an inference of law, which, if traversed, might come to be tried by a jury though the parties agreed upon facts. He therefore sets out his qualification in the terms of sect. 9 of stat. 5 & 6 W. 4, c. 76. In *Regina v. The Mayor of New Windsor*, 7 Q. B. 908, the allegation in the writ was, that the prosecutor was "duly qualified and entitled to be enrolled:" that was perhaps too general, and might be generally traversed. The allegation of general performance here cannot be met by a general denial of performance: the cases on this point are collected in notes (4) and (g) to *Hayman v. Gerrard*, 1 Wms. Saund. 103 d, 6th ed.; and *273] there are *instances of the rule in *Sayre v. Minns*, 2 Cowp. 575, 578, and *Plomer v. Ross*, 5 Taunt. 386. The rule against traversing generally a general averment of performance of condition cannot depend on stat. 8 & 9 W. 3, c. 11, s. 8. Before that statute, if performance had been pleaded generally, one specific breach must have been replied; the statute enabled the plaintiff to assign more breaches than one. A return to a mandamus may comprehend any number of answers arising on distinct matters. Lastly, the third part of the return does not show with

sufficient particularity the liability of the prosecutor to pay the rates. There should be as much particularity as would have been necessary in the case of an avowry for poor rate had provision not been made for a general avowry by sect. 19 of stat. 43 Eliz. c. 2. It does not appear by whom the rates were made. By sect. 92 of stat. 5 & 6 W. 4, c. 76, the borough rate is put on the footing of a county rate; and, by stats. 12 G. 2, c. 29, s. 1, and 55 G. 3, c. 51, s. 1, the justices in quarter sessions rate the several parishes, townships, and other places; the individual occupier is rated by means of the ordinary poor rate out of which the county rate is paid; stat. 12 G. 2, c. 29, s. 2, requiring the parish officers to pay the county rate out of the poor rate. Stat. 7 W. 4 & 1 Vict. c. 81, s. 1, enacts that the borough rate shall be so paid by the parish officers, or persons who by law may lay a poor rate, on the order of the council; or that the council may order such officers or persons to make a certain pound rate for the purpose. Again, if the parish, &c., be, as here it is, partly within and partly out of a borough, stat. 7 W. 4 & 1 Vict. c. 78, s. 29, enables *overseers, or persons appointed to act as overseers, to levy the sums required for the borough rate exclusively [*274 on the part within the borough: and stat. 7 W. 4 & 1 Vict. c. 81, s. 3, regulates the appointment, in such case, of persons to act as overseers. The return should show within which of these cases the rates in question fell. Where the borough rate is to be paid out of the poor rate, the individual cannot be properly said to be liable to the borough rate; but here nothing is alleged but a borough rate.

Lord DENMAN, C. J. Mr. *Crompton's* argument certainly suggests much that is deserving of consideration. No doubt, the suggestion, in a mandamus to admit, that the prosecutor is debito modo electus, may be traversed generally. The prosecutor there may be a stranger: and the party making the return may simply require proof of title. That principle was taken for granted in *Regina v. The Mayor of New Windsor*, 7 Q. B. 908, which was the case of a mandamus to admit. *Regina v. The Mayor of Harwich*, 8 A. & E. 919, came on upon an application for a mandamus to insert a name on the roll: the discussion there arose on affidavit; but it was considered a sufficient answer that the title to be on the roll was not shown. But we all agree that in this case the mayor cannot say that there was not a good burgess list; the list on which he has acted must be taken to be good. The other objections to the return raise a question upon which we will pause.

PATTESON, J. I do not retract one word which I used. No man can help seeing that the mayor had not *the least idea of the burgess lists being otherwise than good. It is a mere after thought. [*275

WILLIAMS and WIGHTMAN, Js., concurred *Cur. adv. vult.*

Lord DENMAN, C. J., in Hilary term (January 19th), 1847, delivered the judgment of the Court.

The first part of this return, which states that the churchwardens did

not sign the burgess list, is bad. This Court held, in the case of *Regina v. The Mayor of Lichfield*, 1 Q. B. 458, that, even when there is no burgess list made out, a person entitled to have his name placed on the burgess roll may come to the Court for a writ of mandamus to compel the insertion: a fortiori he may do so when an imperfect burgess list has been made out. We do not mean to decide that it was necessary for the churchwardens to sign: but, even if it be, their omission to do so cannot be any answer to this writ.

The second part of the return traverses an allegation in the writ, that the applicant had paid all rates. This allegation is made in the terms of stat. 5 & 6 W. 4, c. 76, s. 9, which provides as to the qualification of burgesses. Whether it was necessary to make that allegation in the writ of mandamus itself, under sect. 24 of stat. 7 W. 4 & 1 Vict. c. 78, or not, still it appears to be a material allegation as part of the applicant's qualification or title; and, being so, that it is traversable in the terms of it.

The return goes on to state that certain rates had not been paid by the applicant. We think that this *part is not stated with sufficient particularity; that the times when the rates were made, and the nature of them, should have been more specifically set forth.

We are therefore of opinion that judgment must be given for the Crown on the demurrer as to the first and last parts of the return, and for the defendant as to the second, viz. the general traverse.

A serious doubt has occurred to me, whether the proceedings in this case have been right according to the intention of the statute, which seems to contemplate a speedy remedy, and to impose on the Court the duty of inquiring into the prosecutor's title by affidavit. This course was taken in the cases of mandamus to the Mayor of Eye, reported in 9 Adolphus & Ellis, page 670.(a) It seems right to mention this with a view to the practice in future. Whatever opinion may be ultimately formed herein, our judgment must be as I have stated in the present case, when the writ has not been peremptory, but has called for a return.

The judgment was entered up as follows.

After the joinder in demurrer, and continuances, by *cur. adv. vult.*, down to 19th January, 10th Victoria, and statement of the appearance of the parties on that day, the record proceeded thus. "Whereupon, all and singular the premises being seen and fully understood by the Court of our said Lady the Queen now here, it is considered and adjudged by the said Court here, that so much of the said return as alleges that the said John Langley had not, before the said last day of August, in the year of our Lord 1844, paid all such rates as in the said writ of mandamus in that behalf mentioned *including therein all borough
*277] rates directed to be paid under the provisions of the said act of parliament in the said writ first named as had become payable by him

(a) But see pp. 675, 6.

in respect of the said premises, except such as had become payable within six calendar months next before the said last day of August, in the year of our Lord 1844, as in the said writ of mandamus in that behalf alleged and supposed, is sufficient in law; and that the residue of the said return is not sufficient in law; and that such residue of the said return be quashed. And that the said William Clarke do recover against the said John Langley the sum of 89*l.* 7*s.* 8*d.*, for his costs by him laid out and expended in and about his defence in this behalf, according to the form of the statute in such case made and provided: and that the said John Langley do recover against the said William Clarke the sum of 7*l.* 16*s.* 2*d.*, for his costs by him sustained, laid out, and expended about his suit in this behalf, according to the form of the statute in such case made and provided. And that the said William Clarke do depart hence without day, &c.

IN THE EXCHEQUER CHAMBER.

The QUEEN *v.* The Mayor of DOVER. Dec. 8.

For syllabus, see p. 260, ante.

THE prosecutor brought error on the judgment in the preceding case, in the Exchequer Chamber, assigning for error that the judgment given as to so much of the return as alleged, &c. (the part set out), was given for Clarke against Langley, and the judgment on the residue for Langley against Clarke; whereas the *judgment on the whole of the [*278 return ought to have been given for Langley against Clarke. And that it appeared by the judgment that it was considered and adjudged, &c. (following the judgment); whereas "judgment ought to have been given that the said return of the said William Clarke is not sufficient in law, and that a peremptory writ of mandamus do issue in this behalf, and that the said J. L. do recover against the said W. C. his costs by him sustained, laid out and expended about his suit in this behalf." That the said return is not, nor is any part thereof, sufficient in law to support or warrant the said judgment so given as aforesaid. "That that part of the said return on which judgment has been given for the said W. C. is too general, in stating that J. L. had not paid all such rates as in the said writ mentioned; and that the said return should have specified what rate or rates in particular he had not paid, and when, and by whom, and for what purpose or purposes, such rate or rates was or were made." "That it does not appear, in or by the said return, that any objection was ever duly made to the name of the said J. L. being retained on the said burgess list; whereas it was incumbent on the said mayor of Dover to show, by his said return, that an objection was duly made to the name of the said J. L. being retained on the said list, inasmuch as, by the law of the land, if no such objection were duly

made, the said mayor of Dover had no power to expunge the name of the said J. L. from the said burgess list, but on the contrary thereof, was in such case bound to insert the name on the said burgess roll."

Joinder in error.

The case was now argued.

*279] **Peacock*, for the plaintiff in error (the prosecutor). The judgment on the second part of the return cannot be supported. It is clear that the policy of stat. 5 & 6 W. 4, c. 76, especially as shown by sects. 17, 18, and 19, was that the parties should be retained on the list who were not objected to on some ground which could be sustained before the mayor. [ALDERSON, B. That puts your present claim on the ground that you ought originally to have been on the roll.] If there be ground for striking off, it should be returned. [ALDERSON, B. Suppose the mayor returned that he had, upon objection properly taken, expunged the name, would that be issuable?] An issue upon that would perhaps not determine the case: but it ought at least to appear that the mayor had the power of proceeding. [ALDERSON, B. Is it not for you to show that he had not?] It is enough for the prosecutor to set out a title: if he has no title, still, as he was on the list, a traverse of the title does not answer his claim unless it appears that the proper mode of calling it in question was pursued. The roll is to be made up of the revised burgess lists; sect. 22: if the claimant could not be removed from the burgess list, he was entitled to be on the roll. In sect. 24 of stat. 7 W. 4 & 1 Vict. c. 78, "revision of the burgess roll" is an incorrect expression for "revision of the burgess lists;" Rawlinson on the Municipal Corporation Act, p. 338. [PARKE, B. You do not even aver that the name is unlawfully expunged from the lists.] The Court of Queen's Bench, before stat. 7 W. 4 & 1 Vict. c. 78, could not grant a mandamus where a name had been improperly expunged by a former mayor; In the matter of *The Mayor of Hythe*, 5 A. & E. 832: that decision *pro-
*280] duced the enactment in sect. 24: the intention was to give a power of review; and the question therefore is now whether the name was improperly expunged. [PARKE, B. We must presume the expunging lawful, unless the contrary appear.] A title is shown for that purpose. [PARKE, B. They traverse the title which you do show: strike out the allegation traversed, and you establish no right under sect. 24 of stat. 7 W. 4 & 1 Vict. c. 78.] Suppose the name had not been expunged from the list, but had been omitted in the burgess roll: could the mayor return a want of title to be on the roll from absence of qualification?(a) The question here is not, as was urged in the argument below, between the prosecutor and the burgesses, but between the prosecutor and the mayor: as against the mayor, it is enough to show that he has expunged the name improperly. The necessity of showing absolute

(a) It rather appears that sect. 24 is altogether inapplicable to such a case.

title perhaps arises, in strictness, only on the application for a mandamus; and, after the mandamus has issued, the question regards the proceeding at the revision. But, next, the traverse is insufficient: the failure to pay the rate cannot be pleaded thus generally. It is an established rule that a general plea of performance cannot be generally traversed: *Sayre v. Minna*, 2 Cowp. 575, 578. [PARKE, B. The case of a bond is not analogous: there the plaintiff recovers for the breach of condition.] In *Rex v. Mayor, &c., of Liverpool*, 2 Burr. 723, 731, Lord MANSFIELD said: "It is certainly true" "that where an amotion is returned, the return must set out all the necessary facts, precisely; to show that the person is removed in a legal and proper manner, and for a *legal cause. It is not sufficient to set out conclusions only: they [281 must set the facts themselves out, precisely; that the Court may be able to judge of the matter. And so it is also, as to the cause of amotion: this must be set out in the same manner, that the Court may judge of it." The same rule is shown by *Rex v. The Mayor, &c., of Abingdon*, 2 Salk. 432; *Rex v. Lyme Regis*, 1 Doug. 149, 157, 8, 9; *Rex v. The Mayor, &c., of Doncaster*, 2 Ld. Raym. 1564, 1566. *Ashby v. Harris*, 2 M. & W. 673, in principle, supports the general pleading rule for which the prosecutor contends. It does not appear how the rate was payable by the individual in the first instance, and not from the poor-rate; or whether it was a sub-rate for a part of the parish. Ordinarily, the individual is not directly liable to the borough rate; stats. 5 & 6 W. 4, c. 76, s. 92, 7 W. 4 & 1 Vict. c. 81, s. 1. [ALDERSON, B. Sect. 9 of stat. 5 & 6 W. 4, c. 76, upon which you frame the allegation of title which is traversed, says, that the party must have paid all rates payable "by him" in respect of the premises, "including therein all borough rates."] In *Regina v. The Mayor of New Windsor*, 7 Q. B. 908, it seems to have been held that a general return, that the applicant was not duly qualified, was good; but there the allegation of title was only that the party was duly qualified. The same explanation applies to cases where "not duly elected" has been held a sufficient traverse of the general allegation "duly elected."

Crompton, contra. Each part of the return is good. As to the second part: the first point made on the other side is that the return ought to have shown that *an objection was made on the revision [282 of the burgess lists. That argument rests on a misconception of the nature of the writ. The mayor is not complained of for having improperly expunged the name from the list, but is required now to insert the name on the roll. Even if the title alleged had been that, the name being on the list, it was expunged without objection, that would not have been sufficient; *Regina v. The Mayor, &c., of Harwich*, 8 A. & E. 919 (where, in the marginal note, the word "replace" ought to be altered to "place" or "insert"). But here the title is not so alleged: that which is alleged (and properly, if it be true in fact) is that the party

had a qualification, including, among other things, payment of rates. The denial of the title in the return is not made (as seems to have been supposed by a part of the Court below) to justify the expunging, but as a reason for not now inserting. A like explanation was given of the return in *Rex v. Bailiffs of Morpeth*, 1 Str. 58. The power of the Court of Queen's Bench to issue the mandamus rests exclusively on stat. 7 W. 4 & 1 Vict. c. 78, s. 24. The mandamus can issue only on the application of a party whose claim has been rejected, or name expunged: but he is to show a good title. The legislature evidently assumed that the mayor might have made a right decision on erroneous grounds. In general, the return to a mandamus is sufficient if it show a reason for not complying with the mandate; *Rex v. Round*, 4 A. & E. 189. [PARKE, B. In the case of the same person not continuing in office as mayor, it is difficult to see why the misconduct of a former mayor is to prevent *283] the present mayor from *showing why he cannot comply.] It cannot prevent him: and that shows what the general construction of the statute is. And any other construction would give an opportunity for collusion; since a bad objection might be urged against a party who had no real title. As to the second point, it is sufficient to traverse any essential part of the title as laid. It is contended that the party is not liable directly to a borough rate: he is, at least, liable in the sense in which (as pointed out from the Bench) sect. 9 of stat. 5 & 6 W. 4, c. 76, assumes him to be liable: he must ultimately pay his portion. The rules as to special demurrers can hardly be applied to pleading in mandamus.(a) [PARKE, B. There seems to be a difficulty in any mode of pleading here except that which has been adopted. If an action were brought against the mayor for not enrolling a party, and the declaration alleged payment of all rates, what else could the defendant do but deny the allegation in terms? If he were to plead that the prosecutor had not paid a certain rate, which the return described, that would not be a confession: he must therefore traverse. The special traverse with an inducement would formerly have been a mode of alleging the non-payment of the particular rate without concluding to the country; and that would have enabled the defendant to show what rate he insisted upon. But now the traverse must conclude to the country. Then, is there any difference between such an action and a mandamus to enrol? It is true that, on the trial, it may be assumed that all the rates have been paid till some one rate is shown to have been lawfully *284] made, and not to have been paid: but the *question is as to the pleading.] The case of a bond is inapplicable. There the plaintiff is to show what he claims to recover. Besides, the rules as to pleading, in such a case, are directed to prevent multifarious pleading: but, in the case of a mandamus, there is no limit to the number of excuses which may be shown in the return. And the rates are more within the

(a) See stat. 9 Ann. c. 20, s. 2, 1 W. 4, c. 21, s. 3.

knowledge of the prosecutor than of the defendant. In 5 Bac. Abr. 282 (7th ed.), *Mandamus* (I), it is laid down: "To a mandamus to admit a person alderman, the party may return, that he was not qualified, or that he was not elected: also, several causes may be returned, but they must be consistent; and therefore if the return admits a good election, and afterwards avoids it by the matter repugnant, this is naught." [PARKE, B. The meaning is, that the return of Not qualified or Not elected may be made when the writ avers a qualification or an election: it is not meant that such return may be made by way of confession and avoidance.] That is so, as pointed out in the next page in Bacon: and the rule, so understood, supports this return. Any other rule would make it necessary to return evidence. It is attempted to distinguish *Regina v. The Mayor of New Windsor*, 7 Q. B. 908, on the ground that the suggestion there was only of a general qualification which might well be traversed: but, if there be a distinction, it is in favour of the defendant here, since the traverse not only is not larger than the suggestion, but is more specific than that in *Regina v. The Mayor of New Windsor*. In *Rex v. Mayor, &c., of York*, 5 T. R. 66, it was ruled that, when the writ sets out the proceedings of an election, a return is "not good which states only that the mayor, &c., were "not duly [*285 assembled" "to proceed to the election," though the writ suggested the power of election to be in the persons named, "duly assembled," and alleged that they were "duly assembled:" but that was because the return, by not denying that the persons were "duly assembled" for some purposes, set up a negative pregnant; and because also the return, at another part, admitted the general legality of the assembly. The decisions in *Rex v. Penrice*, 2 Str. 1285, and *Rex v. Williams*, 8 B. & C. 681, go the full length of the principle for which the defendant contends: and in *Rex v. Lyme Regis*, 1 Doug. 79, a return in the conjunctive, "Not duly elected admitted, and sworn," was held bad. In *Rex v. Malden*, 2 Salk. 432, it was held that, when the writ suggested one constitution of a borough and the return set up another, instead of traversing that suggested, the return was bad. *Rex v. The Mayor, &c., of Abingdon*, 2 Salk. 432, is in favour of the defendant: there the traverse, instead of being, generally, that the prosecutors were not capital burgesses, as suggested in the writ, was narrowed to a supposed subsequent invalidation of the election: and it was held that this was bad, as not answering the suggestion in the writ. *Rex v. Mayor, &c., of Liverpool*, 2 Burr. 723, has no resemblance to this case: there the defendants, instead of traversing the suggestion in the writ, returned affirmative matter, which was held insufficient. So in *Rex v. Mayor, &c., of Doncaster*, 2 Ld. Raym. 1564, the return alleged the refusal to obey orders as new matter, and not by way of traverse of any [*286 allegation in the writ. But, next, if the second part be too general, the third part is sufficiently particular, and on that the defendant is entitled to

judgment. [He then proceeded to argue this point: but the Court suggested that it would be advisable to dispose at once of the question as to the second part of the return: to which counsel assented.]

Peacock, in reply. *Regina v. The Mayor, &c., of York*, 5 T. R. 66, is an authority for the prosecutor. [ROLFE, B. In that case the writ did not suggest that the persons were duly assembled to *elect a recorder*; the return was therefore not a traverse.] Suppose here the writ had alleged that a certain rate had been paid, and no other made; it could not then have been a good return to say that others were made. [ROLFE, B. That is the case of a general negative met by a general affirmative; here the general affirmative is met by a general negative.] The return may be said to amount to an affirmative here: it must mean that some rates were made which were not paid. [PARKE, B. How is such a return to be framed? It should state the making of certain rates and the nonpayment. WILDE, C. J. Many authorities seem to show that is enough to traverse the suggestion in terms, and that the prosecutor, if he desires particularity, must set the example. Why did not you say that certain rates were paid and no other rate made?] That raises the question whether the defendant, then, could have returned generally that other rates were made and not paid? [ROLFE, B. That still is the case of a general negative met by a general affirmative.] In *Rex v. *287* Penrice, the traverse was certain to every intent: *here the return raises a mixed question of law and fact. If issue were taken on this traverse, could it be left to the jury whether there had been good rates which were not paid? In *Rex v. Bailiffs of Morpeth*, 1 Str. 58, which has been cited on the other side, the Court said that the return, which stated that the party claiming admittance had not taken the oaths by the act appointed to be taken, was bad for not showing what the oaths were. [PARKE, B. That was new matter.] The title here is occupation subject to the proviso of stat. 5 & 6 W. 4, c. 76, s. 9. It was for the defendant to bring the case within the proviso. Such pleading as this would not be allowed in an action of trespass for distraining for the rates. If a borough rate were made in the ordinary way, there being no sub-rate, the occupant would not be disfranchised for not paying that, for he would be liable only to pay the poor rate.

WILDE, C. J. We are all of opinion that the defendant is entitled to judgment on one point, which goes to the whole case. The question is, what title is suggested by the writ. Is it that the party, being on the list, was struck off without notice? No. But that he was an occupier, and possessed all the incidents to qualification, including payment of all the poor and borough rates payable by him, with exceptions. Is that answered? The answer is that he has not paid all with such exception; that is, a distinct denial. But, then, is the form sufficient? Why, the long course of authorities through which we have been travelling shows that it is enough if the traverse in the return be as particular as the sug-

gestion which is traversed. No *authority has been found showing that such a generality is too large. As, therefore, the title set up is here denied, and in terms not more general than the allegation in the writ, we agree with the judgment of the Court of Queen's Bench on the second part of the return, and affirm their decision. [*286]

COLTMAN and WILLIAMS, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs., concurred. Judgment affirmed.(a)

(a) See *Grey v. Friar*, in *Exch. Ch.*, January 22d, 1850, reversing the judgment of Q. B. in *Friar v. Grey*, July 12th, 1848.

GENT v. CUTTS. Dec. 4.

The condition in a replevin bond, to prosecute the suit without delay, may be broken by a delay which does not exceed the time allowed by the ordinary practice of the courts, if the defendant in replevin be unduly prejudiced by such delay.

Where, therefore, a plaint in replevin was removed into the Superior Court on 2d November, and the plaintiff obtained several successive orders for time to declare, and did not declare until 30th April following: Held, in debt on the replevin bond, that there was evidence for a jury of delay in prosecuting the replevin.

A declaration in debt on a replevin bond stated the bond, the removal of the plaint, declaration in replevin, and avowry, and then alleged that the obligor did not prosecute his aforesaid suit without delay; but, on the contrary thereof, delayed its prosecution for a long and unreasonable time, and until the obligor, long after a reasonable time had elapsed for the trial, died before issue joined. Held, that the language of the breach did not confine the plaintiff to the proof of delay between the avowry and death of the obligor, and that the plaintiff was at liberty to prove a delay in declaring.

DEBT on a replevin bond.

The declaration stated a distress upon one Simpson, since deceased, for rent due to the plaintiff; that thereupon Simpson prayed a return of the distress, and the sheriff took from Simpson a replevin bond in the usual form, conditioned to prosecute his suit "with effect and without delay," the defendant being one of the sureties to such bond; that the sheriff then replevied to Simpson, who levied his plaint in the county-court against the present plaintiff and others; and that *the plaint was duly removed to the Court of Exchequer by *re. fa. lo. re-* [*289] turnable on 2d November, 1848. The declaration then stated that afterwards, to wit, on 30th April, 1844, Simpson declared in replevin against the plaintiff and the others; and that afterwards, to wit, on 9th July, 1844, the plaintiff avowed. Breach: that Simpson "did not nor would prosecute his aforesaid suit in the Court of Exchequer without delay; but, on the contrary thereof, delayed the prosecution of the said action for a long and unreasonable time, and until the said John Simpson, long after a reasonable time had elapsed for the trial and determination of the said action, to wit, on the 16th November, 1844, died, before issue joined:" whereby plaintiff was prevented from obtaining a return of the

distress, and whereby the bond became forfeited; which had since been duly assigned to the plaintiff.

Plea. That Simpson did not delay the prosecution of the said action for an unreasonable space of time, modo et formâ. Issue thereon.

The cause was tried before ERLE, J., at the Middlesex sittings after Michaelmas Term, 1846. It appeared that the bond in question was executed on the 29th August, 1843, and that the plaint had been removed into the Court of Exchequer by writ of *re. fa. lo.* issued on the 7th September, and returnable on the 2d November in the same year. On the 1st November the defendants in replevin entered an appearance in the Exchequer; and on the following day the return to the *re. fa. lo.* was filed. On the 29th February, 1844, Simpson was ruled to declare. He then obtained several orders for time to declare, and did not declare *290] until 30th April, 1844. The delay between 29th *February and 30th April was accounted for by the defendants in the replevin suit not having produced certain documents pursuant to a Judge's order. The defendants avowed, &c., on the 9th July, too late for the cause, which was a country cause, to be tried at the Summer assizes. On the 16th November Simpson died.

For the present defendant it was contended that the only delay charged by the breach was after the avowry, and that there was no evidence of such delay; and also that, if, upon the breach assigned, the plaintiff could rely upon a delay in delivering the declaration in replevin, still there was no evidence of delay even in that respect, as the plaintiff had the time allowed by the general practice of the Court, and had not exceeded that time.

The learned Judge was of opinion that the form of the present declaration did not preclude the plaintiff from relying upon delay in any part of the proceedings in the replevin suit, and also that there was sufficient evidence of delay to go to the jury. A verdict having been found for the plaintiff,

Willes, in the following term, obtained a rule to show cause why there should not be a new trial(a) on the ground of misdirection. He cited Harris v. Mantle, 3 T. R. 307, to show that the plaintiff had no right to rely upon the general terms preceding the words "but on the contrary thereof," &c., in the breach assigned, and contended that the subsequent part of the breach limited him to the proof of delay between the time of *291] avowry and the death of Simpson. He cited Seal v. *Phillips, 3 Price, 17, also, to show that it was not open to the plaintiff to prove delay in declaring in the replevin action, because the present declaration contained no averment that the defendants in that action (including the now plaintiff) had appeared; and contended that such

(a) And also why the judgment should not be arrested; but this part of the rule was abandoned.

delay as was allowed by the rules of practice could be no breach of the condition of the bond.

Bovill and *Wise* now showed cause. Whether the former or latter part of the breach be taken, it is equally general, and in effect the same thing; in the former part the complaint is that the defendant did not prosecute his suit without delay; in the latter, that he delayed the prosecution thereof. If the latter does vary from the former, the former may still be relied upon; *Perreau v. Bevan*, 5 B. & C. 284—305. *Seal v. Phillips* has no reference to any point of pleading, and merely decides that before appearance in the county court the defendant in replevin is not entitled to an assignment of the replevin bond on the plaintiff's neglect to declare at the next county court. There was evidence of delay in declaring in the replevin action; and the verdict ought not to be disturbed.

Willes, in support of the rule, insisted on the points made in moving.

LORD DENMAN, C. J. I think the case was properly left to the jury.

COLERIDGE, J.(a) As to the form of the declaration, I think the evidence of delay in declaring was admissible under the issue. It has been said that the *plaintiff cannot be chargeable with delay so long [*292 as he does not exceed the time allowed by the practice of the Courts. But I think the general rules of practice, which are framed to meet the generality of actions, do not necessarily apply to this case. The periods of time allowable under those rules may be very reasonable in some actions, and very improper in replevin.

ERLE, J. I am of the same opinion. In considering the applicability of general rules of practice to a point like the present we ought not to lose sight of the nature of a replevin suit. The tenant gets the distress out of the landlord's possession and into his own on giving security. If the action is pending for any long time, there is danger that the value of the distress or the solvency of the sureties to the replevin bond may be affected by the delay. I think the plaintiff in such an action is obliged to go on with his proceedings, just as an attorney would be who had contracted to use due diligence.

Rule discharged.(b)

(a) PARRSON, J., had left the Court.

(b) Reported by H. Davison, Esq.

See *Morris v. Matthews*, 2 Q. B. 293.

MALDEN v. FYSON.

M. agreed with F. to purchase land of him. On production of F.'s title, M. objected to it. F. insisted that it was good, and gave notice that he should sell at M.'s risk. M. then filed a bill against F. for a specific performance; and the question of title was referred by the Court of Chancery to a Master, who reported that F. had not a good title: whereupon the bill was dismissed without costs on either side; that being the practice of the Court of Chancery in such cases.

Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the Chancery suit.

THIS was an action on promises, to recover 238*l.* 13*s.* 5*d.*, alleged by the plaintiff to be the amount of damages sustained by him in consequence of *the defendant having failed to make him, the plaintiff, a good *293] title to certain lands and premises, pursuant to the contract hereinafter referred to. Plea: payment of 100*l.* into Court, and that plaintiff had not sustained damages to a greater amount. Replication: damages ultra. Issue thereon.

The cause came on to be tried before PATTESON, J., at the sittings for Middlesex in Michaelmas Term, 1846: when a verdict was found for the plaintiff for 138*l.* 13*s.* 5*d.* damages, and 40*s.* costs, subject to the opinion of the Court on the following case.

On 13th August, 1842, a contract was entered into between the plaintiff and the defendant, whereby the defendant agreed to sell, and the plaintiff agreed to purchase, certain lands and premises, at the price of 350*l.*, subject to certain conditions of sale annexed to the contract. The plaintiff, immediately on the execution of the contract, paid the defendant 35*l.* in part of the purchase-money. The plaintiff's solicitor objected to the title, as disclosed by the abstract, and called for further evidence in support of it. The defendant's solicitor insisted that the title was unobjectionable, regard being had to the conditions of sale. Several letters passed, and interviews took place, between the solicitors of the respective parties upon the subject; and at length, on 24th April, 1843, the defendant, by his solicitor, gave the plaintiff notice that, unless he did within eight days complete the purchase, he would proceed to resell the property; and that, if there should be any deficiency occasioned by such second sale, he would proceed to recover it from the plaintiff, pursuant to the terms of the contract. On 2d May, 1843, the plaintiff gave the *294] defendant notice of his intention *to file a bill against him to compel him specifically to perform the contract of 13th August, 1842, and also for an injunction to restrain him from selling or conveying away the property; and that, if he did sell or convey any part of it, he would be held responsible for so doing, and for all costs and expenses occasioned thereby.

On 3d May, 1843, the plaintiff filed a bill in the Court of Chancery against the defendant, praying for a specific performance of the said contract, for an abatement from the purchase-money in respect of defi-

ciency of quantity and in respect of certain taxes charged on the land comprised in the particulars of sale, and for an injunction to restrain the defendant from selling, conveying, or disposing of the property.

On 13th July, 1843, the defendant filed his answer to the said bill; in which (amongst other things) it was stated that, ever since the contract was entered into, he had alleged, and that he did still allege, that he possessed, and could show, a good title to the said premises so sold to the plaintiff as aforesaid, such as by the terms of the contract he was bound to show, but not further or otherwise. The bill was amended; and a further answer was filed by the defendant on 26th October, 1843; witnesses were examined on 7th February, 1844; and the cause came on for hearing before the Master of the Rolls on 8th July, 1844; when a decree was made, referring it to the Master of the Court in rotation to inquire, and state to the Court whether the defendant could make a good title to the premises comprised in the said agreement; having regard to the terms of the said agreement. On 18th November, 1845, Master DOWDESWELL reported that the defendant could *not make a good title to the said premises. That report was subsequently confirmed by the Court: and, on 18th March, 1846, an order was made by the Master of the Rolls, whereby his lordship ordered that the plaintiff's bill should stand dismissed out of Court without costs. [*295]

It is the practice of the Court of Chancery, when a bill for specific performance of a contract is dismissed owing to the inability of the defendant to perform it, to dismiss such bill without costs.

The question for the opinion of this Court was, whether the plaintiff was entitled to recover in the present action any part of the costs incurred by him in instituting and promoting the said suit in Chancery. If the Court should be of opinion that the plaintiff was so entitled, then the bill of costs of the plaintiff's solicitor was to be taxed in such manner as the Court should direct; and, whatever sum was taxed off, it was (after allowing to the plaintiff the costs of taxation) to be deducted from the said sum of 188*l.* 13*s.* 5*d.*; and the verdict found for the plaintiff was to stand for the residue. If the Court should be of a contrary opinion, then the verdict was to be entered for the defendant.

The case was argued in last term.(a)

Manisty, for the plaintiff. The plaintiff must recover at least some part of the costs in Chancery. The Court of Chancery, indeed, could not, according to its ordinary practice, give costs upon dismissing the bill on the ground of the defendant's inability to perform the contract. But the question before this Court is, whether *the plaintiff has not been damaged in this respect by the fault of the defendant; if so, he is entitled to recover for the special damage. [*296] [WIGHTMAN, J. Why did you file your bill, the defendant having no title?] The defendant asserted that he had a title. In *Sherry v. Oke*, 3 Dowl. P. C. 349,

(a) November 16th. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and EBBE, Js.

the purchaser of land under a contract was allowed, in an action for breach of the contract, to recover as damages the interest of money which had been borrowed by him, and kept idle, to complete the purchase. In *Hopkins v. Grazebrook*, 6 B. & C. 31,^(a) the plaintiff recovered damages for the loss he had suffered by the contract not being performed. [WIGHTMAN, J. You objected to the defendant's title: if you were right, you could not but fail in your suit in Chancery. Lord DENMAN, C. J. Perhaps the defendant might have there produced an amended title.] He might so. If such an objection could prevail, a vendor who repented of his bargain might escape by showing to the vendee a bad title, though he could make a good one. The purchaser has a right to know what the real title is. *Walker v. Moore*, 10 B. & C. 416, shows what are the special circumstances under which the plaintiff is confined to the expense of investigating the title and nominal damages for breach of contract; there the defendants had acted *bonâ fide*, and the plaintiff had incurred the additional damages claimed by acting too hastily. In *Jones v. Dyke*^(b) the purchaser recovered damages of the kind claimed here. *Hodges v. Earl of Lichfield*, 1 New Ca. 492, will be cited on the other side. But there the vendor sued the purchaser in Chancery, and *297] failed; *and the question arose as to the purchaser's extra costs in that suit. The costs of the suit were not, as here, immediately connected with the breach of contract; and the Court of Chancery had, at any rate, fixed the amount. Here there has been no adjudication on the amount. A similar explanation applies to *Hathaway v. Barrow*, 1 Campb. 151. If it be urged that a party cannot, in one action, recover the costs of another, the answer is that such recovery is allowed where no costs could be given in the first proceeding; *Nowell v. Roake*, 7 B. & C. 404, is a strong instance: and that case is recognised and explained in *Grace v. Morgan*, 2 New. Ca. 534, 537.^(c) So, where a party, being illegally arrested, was discharged, but without costs, as he refused to undertake not to bring an action, and he did afterwards bring the action, he was held entitled to recover therein the costs incurred by him on the arrest and application to be discharged; *Pritchett v. Boevey*, 1 C. & M. 775; S. C. 3 Tyrwh. 949.

Martin, *contra*. The plaintiff ought to have insisted on the badness of the title. Instead of that, he institutes an unnecessary suit in Chancery, fails in it because his own objection to the title turns out to be sound, and then sues in this Court to recover the expenses to which he has put himself. First, the damages claimed are too remote. In *Sherry v. Oke*, 3 Dowl. P. C. 349, the damages were a direct consequence of the breach of contract. In *Hopkins v. Grazebrook*, 6 B. & C. 31, also, the damages were direct; it is difficult to see what doubt could arise

(a) See *Robinson v. Harman*, 1 Exch. 850.

(b) Appendix to Sugden's *Vend. & Purch.* No. 5, p. 1078 (11th ed.)

(c) See *Doe v. Filliter*, 13 M. & W. 47

*in the case, except upon the authority of *Flureau v. Thornhill*, 2 W. Bl. 1078, which was there explained. *Jones v. Dyke* is a nisi prius case, which scarcely amounts to a direct decision; *MACDONALD*, C. B., seems there to have intimated what he thought reasonable, in the character of arbitrator. *Hathaway v. Barrow*, 1 Campb. 151, is in favour of the defendant. *Nowell v. Roake*, 7 B. & C. 404, was an action for mesne profits, which is ancillary to the ejectment: there the plaintiff recovered certain costs of the former ejectment, which the Court, before whom the costs were incurred, had no power to award. The damage resulted directly from the defendant's wrongfully withholding possession. In *Sugden's Vend. & Purch.* 424 (Ch. viii. s. 8, 11th ed.), the cases are collected: and no instance will be found of a recovery of damages so remote as these. "Filing a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases;" per *TINDAL*, C. J., in *Hodges v. Earl of Litchfield*, 1 New Ca. 501. Secondly, the plaintiff here, with full knowledge, has taken an unnecessary and inefficient step, which has produced the expense he complains of. [Lord DENMAN, C. J. I cannot see that he has done anything wrong. He was not to suppose himself infallible; he had a right to inquire what the defendant could produce. But the defendant certainly was wrong.] The defendant did not bring the plaintiff into Chancery: he offered to convey with such title as he had; the plaintiff was at liberty to accept or reject. He had *no right to speculate upon the defendant's being able to do more than he had undertaken to do. Thirdly, this is *res judicata*. This Court will not give the costs which have been incurred in a Court of Equity and there refused. They refuse in pursuance of their ordinary practice, which has become a rule. In *Harman v. Tappenden*, 3 Esp. N. P. C. 278, the plaintiff had been restored to a corporate office upon mandamus; and it was held that he could not, in an action for the improper removal, recover the costs of the mandamus. So in *Loton v. Devereux*, 3 B. & Ad. 343, where a judgment and execution were set aside for irregularity, without costs, it was held that such costs could not be recovered as damages in trespass.

Manisty, in reply. The Court of Chancery cannot be said to have adjudicated; they had, by their own practice, no power to give these costs at all. In *Loton v. Devereux* the Court, if they had thought fit, could have given costs in setting aside the judgment. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (December 7th), delivered the judgment of the Court.

The case stated that the plaintiff had become the purchaser, at an auction, of an estate, the defendant's property, and, after paying the deposit, was dissatisfied with the title disclosed on the defendant's abstract. The defendant always insisted upon the sufficiency both of his title and of the evidence tendered to establish it. Under this persuasion

*800] he threatened the plaintiff with *a resale, and an action for not completing his purchase, in which he said he should seek to recover the difference between the price at which the estate had been knocked down to the plaintiff at the auction, and that which it might fetch on such resale.

In this state of things, the plaintiff filed his bill against the defendant in the Court of Chancery, to enforce a specific performance of his agreement to sell the estate. The defendant in his answer professed his readiness to do so, and produced his title, with evidence. The question, whether he could make a good title, was referred to a Master in Chancery, who reported to the Court that he was unable to do so. The bill was dismissed by the Master of the Rolls, without costs to either party. It does not appear whether the title then produced was the same as that which the plaintiff had previously seen and objected to.

The dismissal of the bill was a matter of course when the defendant appeared to want the power to perform his contract; and the refusal of costs to the defendant seems to have been required by justice, as the plaintiff's failure in his suit was occasioned by the defendant's incompetency to fulfil his own engagement. But the plaintiff has brought this action to recover, amongst other things, the costs to which he was put in the prosecution of his unsuccessful suit.

Some of us thought it might be important, in one view of the case, to inquire into the practice of Chancery: and we cannot find or hear of any decision compelling the defendant to pay costs where the bill is dismissed in such a suit. We cannot, however, believe that the Court of Chancery does not possess the power to award costs to a plaintiff under circumstances *301] involving fraud in any part of the negotiation: but, without fraud, the rule appears to be inflexible, that the unsuccessful plaintiff, though not liable to costs, does not recover them in Chancery.

The plaintiff asserts that these costs are the natural consequences of the defendant's breach of contract, coupled with his threat to resell the estate, and, as such, are recoverable. He rests his claim on the practice of Chancery, which, he contends, systematically lays these costs out of its consideration, and leaves them to be recovered in the action at law for the damages resulting from that breach of contract; and urges that, if he cannot so make good his loss at the expense of him who caused it, he has no remedy. On the other hand, the general rule is set up, that the right to costs must always be considered as finally settled in the Court where the question is adjudicated on to which it is accessory.

Several cases were quoted to this effect. And this principle was admitted, in general, to apply; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the Court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in

any other courts. We are of opinion that this case falls within the same principle. The general rule of the Court of Chancery, a Court having full discretion, must be taken to be intended to apply itself as an adjudication in every particular case which falls within it. In the case of *Hodges v. Earl of Litchfield*, 1 New Ca. 492, in which the plaintiff claimed as *damages extra costs of a bill for specific performance, TINDAL, C. J., says: "the extra costs in Chancery are not a [*302 damage which is a necessary consequence of the breach of this contract." "The filing a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases."

The case (a) cited from the Appendix to Sugden's Vendor and Purchaser may perhaps admit of the explanation offered by the eminent Judge before named. At any rate, that case is a solitary decision at nisi prius, though the same state of facts must have existed frequently, and have founded innumerable claims to similar redress.

Judgment for defendant.

(a) *Jones v. Dyke*, Appendix to Sugden's V. & P. No. 5, p. 1078 (11th ed.)

BARBER v. LEMON. Dec. 7.

Debt by drawer of a bill of exchange against acceptor. Plea, that, before action, plaintiff endorsed and delivered the bill to a third person, D., who then became, and thence afterwards, to wit, thence hitherto, remained, the holder thereof by virtue of such endorsement. Replication, that at the commencement of the action plaintiff was the holder of the bill, without this that D., from the time the bill was so endorsed and delivered to him "hitherto," remained the holder thereof, modo et forma.

Held, on special demurrer, that the replication was good; that it was not necessary to state how the bill, which plaintiff admitted that he had endorsed away, came back to him; and also that the traverse was not too large, as putting in issue immaterial matter by denying that D. was the holder from the time of endorsement "hitherto," because, if issue had been joined on the traverse, the defendant would have succeeded by proving that D. was holder at the time of the commencement of suit.

DEBT. The first count of the declaration was on a bill of exchange, drawn by plaintiff upon, and accepted by, defendant, for 9l. 19s. payable two months after date to plaintiff's order: and the second count upon an account stated.

Pleas. 1. To the first count, that, after the said *bill of ex- [*308 change was drawn and accepted, and before the same became due, and before the commencement of this suit, to wit, on, &c., the plaintiff, then being the holder of the said bill, as such drawer thereof, endorsed and delivered the same to certain persons carrying on business under the name, style, and firm of Mark Davis & Son, who then became, and thence afterwards, to wit, thence hitherto, remained, the holders of the said bill by virtue of such endorsement thereof as last aforesaid: verification. 2. To the second count, that the account therein stated was stated be-

tween plaintiff as the drawer, and defendant as the acceptor, of the said bill in the declaration mentioned, and not otherwise, and of and concerning no other item or matter than the liability of the defendant to pay the plaintiff, as such drawer, the amount of the said bill, according to the tenor and effect thereof, and of his, defendant's, said acceptance. That afterwards, and before the commencement of this suit, and while plaintiff was the holder of the said bill as such drawer thereof, to wit, on, &c., the plaintiff for valuable consideration in that behalf, that is to say for a large and sufficient sum of money, to wit, a sum equal to the amount of the said bill and all causes of action arising out of, upon, or in respect of the same, endorsed and delivered the said bill to certain persons carrying on business under the name, style, and firm of Mark Davis & Son, and from whom the plaintiff then received the said sum in satisfaction of the amount of the said bill and of all causes of action arising out of, upon, or in respect of the same; and that the said Mark
 *304] Davis & Son then became, and thence afterwards, to wit, thence
 *hitherto, remained and were, the holders of the said bill by virtue of such endorsement. Verification.

Replication to the first plea: that, at the time of the commencement of this suit, the plaintiff was the holder of the said bill, without this, that the said persons in the plea mentioned, from the time the said bill was so endorsed and delivered to them as in that plea mentioned hitherto, remained the holders thereof, modo et formâ. Conclusion to the country.

The replication to the second plea was in the same terms as the replication to the first.

Special demurrer to the replication to the first plea. The principal grounds were that the replication neither traversed, nor confessed and avoided, the allegation in the first plea that plaintiff endorsed and delivered the bill as therein alleged; that it did not disclose in what manner any right of action in debt accrued to plaintiff after he had so endorsed and delivered the bill; that it did not disclose in what manner plaintiff became the holder of the bill at the time of suit; and that plaintiff might have become such holder either as bailee, in which case he could maintain no action at all, or as endorsee, in which case he could maintain no action of debt against defendant as acceptor: that plaintiff should have affirmatively alleged any new title which he might have acquired to the bill, and should have concluded with a verification: that the traverse taken was too large, and put in issue what was irrelevant and immaterial, viz. that the persons mentioned in the plea were the holders of the bill at the time of pleading, whereas it would be sufficient to sustain the plea to show that they were the holders at the time of suit. Joinder in demurrer.

*305] *Special demurrer to the second replication. The principal grounds were that the replication neither traversed, nor confessed and avoided, the effect of the second plea, inasmuch as it left unan-

swered the averment that, after the statement of the account, the bill, concerning which the said account was stated, was endorsed by plaintiff for valuable consideration, the receipt of which operated as a satisfaction of plaintiff's right of action on the bill, and on the account stated in respect of such bill, the plaintiff having, by endorsing the bill, assigned to his endorsees the only debt of which the account was stated: that the replication left unanswered averments which showed that the debt arising upon the account stated was subsequently satisfied by receipt of the amount from third parties to whom defendant then became liable to pay such amount: that, if, subsequently to such endorsement and after plaintiff became again holder of the bill, any new account was stated, the same should have been newly assigned: and that the replication was a departure, as it showed a right of action on the bill rather than on the account stated. Other grounds also were assigned, which were the same in terms with some of the grounds of demurrer to the first replication. Joinder in demurrer.

Fortescue, for the defendant.(a) The pleas are good. They show that the plaintiff endorsed the bill away before action, and so displace the only title set up in the declaration; *Bartlett v. Benson*, 14 M. & W. 733, *Schild v. Kilpin*, 8 M. & W. 673. The replications are bad. They do not show *in what manner the plaintiff re-acquired title to the bill after his endorsement. If they show a new title in him as endorsee, then debt is not maintainable; for the privity between drawer and acceptor is abandoned; and there is also a departure from the declaration. It was perhaps necessary that he should have declared on his new title. But the replications do not show any new title; for, in the inducement, they merely allege that he was the "holder" of the bill at the commencement of the suit. He may have become the "holder" by delivery only without endorsement; and such delivery confers no right of action; *Cunliffe v. Whitehead*, 8 New Ca. 828. Lastly: the replications deny that the persons mentioned in the plea remained holders of the bill from the time of the endorsement "hitherto," that is, up to the time of replication. This traverse is too large: it puts the title in issue, not with reference to the time of commencing the suit only, but to the time of pleading.(b) Such a traverse makes the replications bad. The point was expressly decided in *Basan v. Arnold*, 6 M. & W. 559.

Crompton, contra. The replications are good. They set up no new title; they traverse the only material allegations in the pleas, viz. that other persons than the plaintiff held the bill at the commencement of the action. The replications adopt the very form recommended in *Fraser v. Welch*, 8 M. & W. 629, 636. Even if the plaintiff had acquired new title he would be remitted to his former title. The word "hitherto" in the replications is surplusage, and does not vitiate, even if surplusage

(a) The demurrer was argued before Lord DENMAN, C. J., PATTESON, WIGHTMAN, and ERLE, JA.

(b) See *Fisher v. Ford*, 12 A. & E. 654.

*307] were a ground of *demurrer. Although the pleas allege that Davis & Son remained holders "hitherto," and the replications traverse the pleas modo et formâ, yet it would have sufficed the defendants to prove the substance of the pleas; Stephen on Pleading, 220, note n, 5th ed. The traverse is confined to that which is material: *Basan v. Arnold*, 6 M. & W. 559, is virtually overruled by *Palmer v. Gooden*, 8 M. & W. 890.(a) The replication in that case followed the plea, and included something immaterial in the traverse; but the Court of Exchequer Chamber held, reversing the judgment of the Court below, that "a party does not make an issue upon the substantial matter to be tried by the jury bad, merely because he includes in it something of total surplusage and immateriality."

The plaintiff is at all events entitled to succeed on the account stated; for it must be understood, from the plea, that the account was stated after the bill became due. If so, the transfer of the bill could not transfer the account stated: and it is no answer, in law, that plaintiff is a mere trustee for defendant.

Fortescue, in reply. The only account stated is respecting the bill, an assignable contract; and the account stated runs with the bill. With respect to the form of traverse, it is said that the immateriality is mere surplusage, and therefore does not vitiate the replications. The same argument would show that a traverse never can be too large. In *Palmer v. Gooden*, 8 M. & W. 890, the immaterial allegation was insensible, and was rejected on that account. *Cur. adv. vult.*

*308] *Lord DENMAN, C. J., on a subsequent day in this vacation (11th December), delivered the judgment of the Court.

In this case the plaintiff declared in debt, as drawer of a bill of exchange payable to his own order, against the acceptor, with a count upon an account stated. The defendant pleaded, to the count upon the bill, that it was endorsed by the plaintiff to certain persons "who then became" and "thence hitherto remained, the holders" therein. The plaintiff replied that he was the holder at the commencement of the suit, without this, that the said persons mentioned in the plea "from the time" of the endorsement, "*hitherto*, remained the holders thereof." To this traverse there was a demurrer; and several causes were specially assigned.

It was contended for the defendant that the plaintiff, instead of traversing the allegation of the persons named in the plea being the holders, should have shown by his replication how the bill, which he admits to have been endorsed and delivered to those persons, came back to him again.

We are clearly of opinion that there is nothing in this objection, and that a traverse was the only mode of pleading that could be adopted by the plaintiff, as he could not plead in confession and avoidance without

(a) In Exch. Ch., reversing *Palmer v. Gooden*, in Exch. 7 M. & W. 486.

admitting that the persons named in the plea were the holders at the time of the commencement of the suit: the special matter could only have been stated by way of inducement; and the replication must have concluded with a traverse of that which was admitted to be a material and necessary averment in the plea. The point indeed was expressly decided in *Fraser v. Welch*, 8 M. & W. 629, 636, *and the correct form of replication given; which is the same in substance as that [309 in the present case.

But it was also contended by the defendant that the traverse was too large, and put in issue immaterial and irrelevant matter; for it denied that the persons named in the plea were the holders from the time of the endorsement "*hitherto*," using the very terms of the plea, which included a time posterior to the commencement of the suit. We should be extremely unwilling to give effect to such an objection, unless compelled to do so by the strict rules of pleading; but we do not think that we are so compelled. The only material part of the allegation is that the persons named in the plea were holders at the time the suit was commenced; and, as stated by the defendant himself in his demurrer, it would be sufficient, in order to support the allegation in the plea, to show that such persons were the holders at the time of the commencement of the suit. If so, such proof would be sufficient if the defendant had joined issue upon the traverse; and he could therefore sustain no inconvenience by the largeness of it. In *Palmer v. Gooden*, 8 M. & W. 890, in the Exchequer Chamber, a similar objection was taken to including immaterial matter in a traverse; but the objection was overruled; and TINDAL, C. J., in pronouncing the judgment, says: "a party does not make an issue upon the substantial matter to be tried by the jury bad, merely because he includes in it something of *total surplusage* and immateriality." This case appears to us to be a direct authority against the objection.

Upon the argument, the defendant relied upon the case of *Basan v. Arnold*, 6 M. & W. 559: but it may be observed *that that case [310 is distinguishable from this in its circumstances; for the traverse there was "without this, that any other person is the holder thereof, in manner and form." The only matter directly put in issue by that traverse was, whether the person was the holder at *the time of plea pleaded*; which was obviously insufficient.

Similar objections were made to the replication to a special plea to the account stated: but we are of opinion that such objections cannot be sustained, for the reasons already given.

Our judgment, therefore, is for the plaintiff.

Judgment for plaintiff.(a)

(a) Reported by H. Davison, Esq.

See *Arthur v. Beales*, 1 Exch. 608.

*311]

*WEBSTER v. WATTS. Dec. 7.

To a declaration in trespass for assaulting and seizing plaintiff, and forcing him to go as a prisoner from and out of a certain public-house to a police station, it is a good plea in justification :

That defendant was lawfully possessed of a house, being a tavern, &c. : that plaintiff came into the house and made a disturbance, and assaulted defendant and others there, and afterwards stood and remained in the public highway near and opposite to the door of the said house and made a disturbance there, and used menacing language to defendant and his family, then in the said house and within hearing ; and that, by reason of such the plaintiff's conduct, while he so stood, &c., many persons, while he so stood, &c., congregated in the said highway near to and opposite, &c., and made a noise, disturbance, and riot in the said highway near, &c., in breach of the peace and to the obstruction of defendant's business and of the said highway : and that, at the time of the removal after mentioned, plaintiff persisted in so standing, &c., making such noise, &c., and, by reason of his so standing, &c., making, &c., was causing many people to congregate in the said highway opposite and near to, &c., in breach of the peace and to the obstruction of the said highway, although, before such removal, and while he was so standing, &c., making, &c., he was requested by defendant to depart, &c., and to cease from making such noise, &c. Wherefore defendant, in order to restore and preserve the peace, and to get rid of the nuisance so occasioned by plaintiff, just before the times when, &c., gave plaintiff in charge to A. B., a constable, and required A. B. to remove plaintiff and deal with him according to law : and A. B., then being such constable, thereupon removed plaintiff and took him to the police station, and detained him there to be dealt with according to law and examined by a justice of peace, and for the purpose of so doing, and in so doing, committed the trespasses, &c.

To a declaration for assaulting and seizing plaintiff, &c., defendant pleaded that he was lawfully possessed of a dwelling-house ; that plaintiff was unlawfully therein, with force and arms, making a noise and disturbance in the said house without defendant's leave, and defendant thereupon requested him to depart, which he refused to do ; whereupon defendant, in defence of the possession of his house, &c., *molliter manus*, &c., to remove, and did remove, plaintiff therefrom. Replication : That the said dwelling-house was a common inn, and plaintiff, at the times when, &c., was lawfully therein as a guest, consuming liquors there sold by defendant, which plaintiff had paid for, and at a reasonable time ; wherefore plaintiff refused to depart when requested, as he lawfully, &c. : "and the defendant, of his own wrong, committed the trespasses in the said plea mentioned, in manner and form as in the declaration alleged."

Held, that the replication was bad, because it did not answer the allegation of plaintiff's misconduct.

Held also, by Lord DENMAN, C. J., that the replication was double ; and, by ERLE, J., that it was argumentative.

TRESPASS. The declaration stated that defendant assaulted and struck plaintiff, and seized and laid hold of and pulled him about, and forced him to go as a prisoner from and out of a certain public-house, into and through divers public streets, &c., to a police station, and there then imprisoned him, &c.

*312] Plea 2. As to the assaulting, striking, seizing, and *pulling about the plaintiff, in the manner in the declaration mentioned, at the said times when, &c. : That defendant, before and at the said times when, &c., was lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being, &c. ; and, being so possessed thereof, plaintiff, just before the said times when, &c., to wit, on, &c., was unlawfully in the said dwelling-house, and, with force and arms, &c., making a great noise and disturbance therein, and at the said times when, &c., stayed and continued therein making such noise and disturbance, without the leave or license, and against the will, of defendant ; and

during all that time greatly disturbed and disquieted defendant and his family in the peaceable and quiet possession and enjoyment of the said dwelling-house; and thereupon defendant then requested plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which plaintiff then wholly refused to do. Whereupon defendant, in defence of the possession of his said dwelling-house, at the said times when, &c., molliter manus imposuit to remove plaintiff, and did then remove him, out of the said dwelling-house, as he lawfully, &c., and, for the purpose of so doing, committed the trespasses, &c. Verification.

Fourth plea. As to the said alleged trespasses in the declaration mentioned: That defendant, just before and at the said times when, &c., was lawfully possessed of a certain house, being a tavern or alehouse, situate, &c. That plaintiff, before any of the said times when, &c., to wit, on, &c., entered and came into the said house of defendant, and then made a great noise and disturbance therein, and then behaved and conducted himself in a rude, quarrelsome, and uncivil manner towards defendant *and divers and very many persons, then lawfully being in the [*318 said house, and then assaulted, abused, and ill-treated defendant and divers and very many persons, then being in the said house; and afterwards, and before any of the said times when, &c., to wit, on, &c., plaintiff stood, and thence continually up to and at the time of his being removed as hereafter mentioned, plaintiff remained standing, and stood, in the common Queen's highway near to and opposite the door of the said house, and, while he so stood there, made a great noise and disturbance in the said common Queen's highway near to and opposite the door of the said house, and used loud, menacing, and disgusting language to defendant and his family, then being within the said house and within hearing of him; and that, by reason of the aforesaid conduct of plaintiff, while he stood as aforesaid in the position aforesaid, divers and very many persons, at the said times while he stood as aforesaid in the position aforesaid, congregated in the common Queen's highway near to and opposite the door of the said house, and made a great noise and disturbance and riot in the said common Queen's highway near to and opposite the door of the said house, in breach of the peace, &c., and to the obstruction of the business carried on by defendant in his said house, and to the obstruction of the said common Queen's highway there. That at the said time of plaintiff's being removed as hereafter mentioned, plaintiff persisted in so standing near to and opposite the door of the said house, making such noise and disturbance and using such language as aforesaid: And that, at the time of plaintiff's being removed as hereafter mentioned, plaintiff, by reason of his so standing as aforesaid in the position aforesaid, making such noise and disturbance, and using such language as *aforesaid, was causing divers and very many people [*314 to congregate in the said common Queen's highway opposite and

near to the door of the said house, in breach of the peace, &c., to the great obstruction of the business carried on by defendant in the said house, and to the great obstruction of the said common Queen's highway there, although, before plaintiff was removed as hereafter mentioned; and while he was so standing in the said common Queen's highway as aforesaid, making such noise and disturbance and using such language as aforesaid, and before he was given in charge by defendant as hereafter mentioned, to wit, on the day and year last aforesaid, he was requested by defendant to go and depart from where he so stood, and to cease from making such noise and disturbance, and from using such language as aforesaid. Wherefore defendant, in order to restore and preserve the peace, &c., and to get rid of the nuisance so occasioned as aforesaid by plaintiff, just before the said times when, &c., to wit, on, &c., gave plaintiff in charge to one John Cotterell, then being a constable and peace officer, &c., and then required the said J. C., so then being such constable, &c., to remove plaintiff from where he so stood, and deal with him according to law; and the said J. C., so then being such constable, &c., thereupon, at the said times when, &c., did remove plaintiff from where he so then stood, and took him to the police station in the declaration mentioned, and detained him there for a short time, to wit, &c., that he might be dealt with according to law, and examined by one of the justices of the peace, &c., concerning the premises; and the said J. C., so then being such constable, &c., at the said times when, &c., for the purpose of so doing, and in so doing, committed the trespasses, &c. Verification.

*315] *Replication to plea 2. That the said dwelling-house, in that plea mentioned, was, before and at the said times, when, &c., a common inn, victualling-house and alehouse; and plaintiff was, before and at the said times, when, &c., and at the time when he was requested by the defendant as in the said second plea mentioned, lawfully in the said dwelling-house as a guest, lawfully drinking and consuming liquors which he, the plaintiff, had, just before the said times, when, &c., to wit, on, &c., purchased of and paid for to the defendant, then being the keeper of the said inn, alehouse, &c., to be drunk and consumed there, such time being a lawful and reasonable and proper time in that behalf: wherefore plaintiff did refuse to depart from and out of the said dwelling-house in the said second plea mentioned, so being such common inn, alehouse, &c., when he was so requested by defendant, as he lawfully might for the cause aforesaid. And defendant of his own wrong committed the trespasses in the introductory part of the second plea mentioned, in manner and form as in the declaration in that behalf alleged. Verification.

Demurrer to plea 4, on the grounds that, although it is pleaded to and professes to answer all the trespasses in the declaration, it does not confess, avoid, or in any way answer part thereof, viz. that defendant

forced plaintiff to go as a prisoner and in custody from and out of a certain public-house into and through divers public streets, &c. Joinder.

Demurrer to the replication to plea 2, assigning for grounds: 1. That the replication is an argumentative traverse of defendant's being possessed of the dwelling-house in the second plea mentioned at the time and in the manner therein mentioned. 2. That the replication is an argumentative denial of defendant's being entitled *to the exclusive possession of the dwelling-house in the second plea mentioned [316 at the time and in the manner therein mentioned. 3. That the replication is an argumentative traverse of plaintiff's making the noise and disturbance and disturbing and disquieting defendant and his family in the peaceable and quiet possession and enjoyment of his said dwelling-house at the time and in the manner in the said second plea mentioned. 4. That the replication asserts that plaintiff was such guest, and drinking and consuming liquors, as in the said replication mentioned, in the manner and at the time therein mentioned; and also asserts that defendant of his own wrong committed the trespasses in the introductory part of the said second plea mentioned: and that the said replication is on that account double.(a) Joinder.

Pearson, for the plaintiff. The replication to the second plea is good. The allegation in that plea, that the plaintiff was making a noise and disturbance in defendant's dwelling-house, is superfluous and premature; for the owner of a house has a general *prima facie* right to turn any person out of it. Such an allegation *need not be replied to; "for a [317 superfluous allegation, prematurely made in anticipation of some matter which may be subsequently pleaded on the other side, need not be noticed by the adverse party, and is not traversable. Thus, if the plaintiff, in declaring in an action of escape, alleges that the sheriff *voluntarily* permitted the prisoner to escape, the defendant may nevertheless plead that he took the prisoner on fresh pursuit (though such a plea would be no bar if, in fact, the escape was voluntary), without traversing the voluntary escape; because the word 'voluntary' in the declaration is superfluous and unnecessary, and does not bind the plaintiff, who would be at liberty to give a *negligent* escape in evidence; but if in truth, the escape was voluntary, the plaintiff must reply that fact;" note (s) to *Hodsdon v. Harridge*, 2 Wms. Saund. 68 b, 6th ed. The same rule of plead-

(a) The following grounds were also stated, but not discussed. 5. That it does not appear from the replication, with sufficient certainty, how it was that defendant, of his own wrong, committed the trespasses, &c., or how it was wrong for defendant to commit those trespasses. 6. That it does not appear from the replication, with sufficient certainty, whether plaintiff intends to assert therein that defendant committed the trespasses in the introductory part of the second plea mentioned without the cause: by him in his said plea alleged. 7. That it is uncertain whether or not the replication intends to assert that defendant committed the trespasses without the cause mentioned in the plea, and also under the circumstances set forth in the replication, or whether it intends to assert that it was wrong of defendant to commit those trespasses because of the matters stated in the said second plea not being true, or because of the circumstances set forth in the replication.

ing is exemplified in *Taylor v. Cole*, 3 T. R. 292, (a) *Monprivatt v. Smith*, 2 Campb. 178, and *King v. Phippard*, Carth. 280. The plaintiff, therefore, was here bound to treat the plea as justifying the expulsion, not on the ground of his misconduct, but by reason of the defendant's right to the possession: and he was also bound to reply specially; for the new matter of his replication would have been inadmissible in evidence in support of a replication consisting merely of the general traverse; *Sayre v. The Earl of Rochford*, 2 W. Bl. 1165. The noise and disturbance should have been made the subject of a rejoinder like the replication in the *Six Carpenters' Case*, 8 Rep. 146 a. (b)

*818] The fourth plea shows no sufficient justification for giving the plaintiff into custody without warrant. The latter acts of misconduct ascribed to him are, in point of time, connected with those done on the defendant's premises only by the word "afterwards;" and the misconduct of the other persons is only stated to have been "by reason" of his acts. It ought to have appeared that there was a breach of the peace continuing, or that an affray would have been renewed if the plaintiff had not been arrested; *Price v. Seely*, 10 Cl. & Fin. 28. A plea not showing such facts was held insufficient in *Baynes v. Brewster*, 2 Q. B. 375. Among other authorities on the same point are *Green v. Bartram*, 4 Car. & P. 808, *Wheeler v. Whiting*, 9 Car. & P. 262, *Grant v. Moser*, 5 Man. & G. 123, *Timothy v. Simpson*, 1 Cro. M. & R. 757, S. C. 5 Tyr. 244, in which last case it was held to be a defence that the defendant actually saw an affray going on when he called the constable in; *Ingle v. Bell*, 1 M. & W. 516, S. C. Tyr. & G. 801, where the plea, which was upheld, showed a continuing breach of the peace; and *Cohen v. Huskisson*, 2 M. & W. 477, where the arrest was held to be justified, but the breach of the peace had continued after the officers were present. (c) [ERLE, J. In the present *case, according to *819] the allegations, how could the constable fail to see the plaintiff

(a) Judgment affirmed on error; *Taylor v. Cole*, 1 H. Bl. 555.

(b) The report thus far is by H. Davison, Esq.

(c) Pearson also cited *Reece v. Taylor*, 4 Nev. & Man. 469. It appears, by the reporters' notes, and by the statement in 4 Nev. & Man., that the declaration there consisted of a single count in trespass for assaulting and turning the plaintiff out of a certain messuage, and forcing him to go through the streets to a police office, &c. Pleas: 1. Not Guilty. 2. As to the assaulting and forcing plaintiff to go to a police office, that defendant was lawfully possessed of the said messuage, and that plaintiff was there, unlawfully, and with force and arms, making a noise and disturbance, &c., and plaintiff refusing to depart on defendant's request, defendant molliter manus, &c.; and thereupon plaintiff, in presence of a police officer, assaulted defendant; whereupon defendant, to preserve the peace, gave plaintiff into the custody of such officer, &c. Replication to plea 2: De injuria. On the trial before Lord DENHAM, C. J., at the sittings in Middlesex after Michaelmas term 1834, the first allegations in the plea were proved, but not the assault by the plaintiff; the Lord Chief Justice therefore held, that the justification failed as to the carrying to a police office, and that, consequently, for this trespass, the plaintiff must recover some damages. Verdict for plaintiff. *Mauls*, in Hilary term (January 14th), 1835, moved for a new trial on the ground of misdirection, contending that the arrest and carrying to a police office were merely excess, and, if relied upon, should have been replied. The court, however (Lord DENHAM, C. J., LITLEDAL and WILLIAMS, J.), held that the defendant had justified a substantial trespass

breaking the peace? . WIGHTMAN, J. It may perhaps be asked, on the plaintiff's part, what offence is shown with which he could have been legally charged before a magistrate.]

T. Jones, contra. As to the 4th plea, *Cohen v. Huskisson* is a conclusive authority for the defendant. Here, as in that case, there is no direct averment of an act in breach of the peace, committed by the plaintiff; but it is alleged that the persons drawn together by his behaviour made a great disturbance and riot in the highway near the defendant's house, "in breach of the peace," and that the defendant, "in order to restore and preserve the peace," gave the plaintiff in charge to a constable. The plea contains all the material facts proved and relied upon by the Court of Exchequer in *Cohen v. Huskisson*: the statements are tantamount to an allegation that the peace was broken; *and the plea is not demurred to on the ground that that fact is [*320 insufficiently alleged. It must be maintained on the other side that, if a man is making a disturbance in the highway before another's house, the owner cannot call in an officer to remove him, without a warrant. (*The Court* held further argument for the defendant unnecessary on this demurrer.)

Then as to the replication to plea 2. The plaintiff was not at liberty to reply specially, leaving unnoticed the allegation in the plea that he was making a disturbance. That statement was not necessarily surplusage. It is true that the defendant might have pleaded that the plaintiff was in his house and would not go out on request; and that would have been a justification: but he was also at liberty to plead that the plaintiff was in the house making a disturbance; that likewise is a justification, though the additional circumstance was not required. He might, if he had thought proper, have pleaded that the house was a public-house and the plaintiff making a disturbance in it, and then the making a disturbance would have been a material allegation; but there was no rule which prevented his describing the house as he has done, and adding the statement of a disturbance. [WIGHTMAN, J. It is a question of form, whether the making a disturbance should not have been pleaded by way of rejoinder to a replication alleging that the messuage was a public-house. If *De injuriâ* had been replied to the second plea, might the plaintiff have given the matter now relied upon in evidence?] He might. The essential point of the plea is that the defendant had a legal excuse. If the question had been tried by evidence, it would have *appeared that the house was the defendant's but was a public- [*321 house: then the fact that the plaintiff was making a disturbance there would have been a necessary part of the evidence in justification. The objection of duplicity, if it arises here, is not properly taken by the

alleged in the count as part of the ground of action, and, failing to prove a necessary part of the justification, was liable on the present pleadings. *Macle* finally endeavoured to show that the evidence was not insufficient. Rule refused.

demurrer. The replication to plea 2 is bad on other grounds. It virtually denies the defendant's possession of an ordinary dwelling-house by denying the exclusive possession; *Monks v. Dykes*, 4 M. & W. 567; and, in that point of view, it is an argumentative *De injuriâ*. And, if it admits the possession of a public-house, it fails to deny that the plaintiff was making a disturbance there, which, if uncontradicted, is an answer to the action. It is also double, inasmuch as it begins by stating certain facts which justified the plaintiff in refusing to leave the house when requested, and then adds in conclusion: "And the defendant of his own wrong committed the trespasses in the introductory part of the second plea mentioned, in manner and form," &c. The words "*absque tali causâ*" are wanting: but a replication *De injuriâ* may be good after verdict without these words: *Aubery v. James*, 1 Vent. 70.

Pearson in reply. As to the last objection: denial of the excuse is the essential part of a replication *De injuriâ*. The words "of his own wrong," &c., omitting "*absque tali causâ*," are inoperative. The replication to plea 2 is not necessarily an argumentative traverse. The description of the defendant's house in a previous stage of the pleadings does not tie down the plaintiff in his answer: he may vary that description so as to meet the truth of the case, upon the principle recognised in *322] *Searle v. Darford*, 2 Lutw. 1435, S. C. 1 Ld. Ray. 120. The 4th plea differs from that in *Cohen v. Huskisson*, 2 M. & W. 477, because here the noise, riot, and disturbance, which form the only material breach of the peace, are attributed, not to the plaintiff, but to other persons.

Lord DENMAN, C. J. The declaration in this case complains that the defendant assaulted the plaintiff, and forced him to go in custody from and out of a certain public-house to a police station. The second plea, as to the assaulting and seizing, states that the defendant was possessed of a dwelling-house, and that the plaintiff was unlawfully therein, making a noise and disturbance, and being requested by the defendant to depart out of the house, refused, whereupon the defendant, in defence of his possession, gently laid his hands on the plaintiff and removed him. The replication alleges that the said dwelling-house was a common inn and alehouse, and that the plaintiff was lawfully therein as a guest, at a reasonable time in that behalf, wherefore he refused to depart when requested by the defendant, and the defendant of his own wrong committed the trespasses. This replication shows that the plaintiff was where he had a right to be if conducting himself properly: but it does not deny that he was acting improperly as the plea alleges, or that the defendant removed him for the cause there stated. The replication, therefore, is no answer. And it is double; for the case in *Ventris*, (a) shows that it has such a conclusion as would suffice for a replication *De injuriâ*; and at the same time it alleges particular facts as showing the

(a) *Aubery v. James*, 1 Vent. 70.

plaintiff's right to *remain in the house. The fourth plea contains a good justification. It states that the plaintiff was making [323 a noise and disturbance opposite to the defendant's house, using loud and menacing language to him and his family, and that, by reason of such his conduct, while he stood there, many persons congregated in the highway and made a disturbance and riot there, near to and opposite the door of the house, in breach of the peace and to the obstruction of the defendant's business, and of the highway. It is asked, if the plaintiff was taken before a justice, with what offence could he be charged? I am not prepared to say; but is it possible to contend that a person acting in the manner described could not be removed as the plaintiff was here? It is part of the necessary protection of every man's house that this should be done; the peace of all the world would be in jeopardy if it could not. The defendant is entitled to judgment.

WIGHTMAN, J.(a) The replication to the second plea is no sufficient answer. It shows that the house was a public-house, and the plaintiff lawfully there; and the averments might have been sufficient if the plea had only stated the defendant's possession and a general right to remove the plaintiff on his refusal to depart upon request. But the replication is no answer if it appears that the plaintiff was behaving improperly by making a disturbance in the house. That is shown by the plea; and it therefore presents material facts which are not met by the replication. It was not necessary for the defendant to state by way of rejoinder what is already alleged by the plea and admitted by the *replication. [324 I had more doubt on the question whether or not the fourth plea gave a sufficient justification: but, on reference to the case which has been cited,(b) I think it does. The plaintiff was creating a public nuisance, and must have been doing so in the officer's view; for the acts appear to have been done just before the officer took him.

ERLE, J. I think that the replication to plea 2 is argumentative, and that the plaintiff ought to have replied *De injuriâ*. The plea alleges that he was unlawfully in the defendant's dwelling-house, with force and arms, making a noise and disturbance therein, without the defendant's license, and refusing to depart on his request. That amounts to an allegation that he was a trespasser: and, on a general traverse, the defendant would have been bound to show that he was so. The replication does not deny or confess it, but merely sets up something in the nature of a license to be in the house. As to the fourth plea: it is agreed that the officer would have had a right to arrest if there had been a breach of the peace committed, and in his view. Here no actual blow is stated; but acts of the plaintiff are shown (his Lordship here recapitulated them from the plea), which bring the case within the authority of *Cohen v. Huskisson*; and I think that was a very salutary decision. It is not

(a) PATTERSON, J., had left the court.

(b) *Cohen v. Huskisson*, 2 M. & W. 477.

every noise, nor every circumstance alarming to a very timid person, which will justify giving charge of the party who misconducts himself. but, when a man is standing in the highway opposite to another's house, making a disturbance, exciting others to disturbance and riot, and obstructing *the public way, these are facts which may well, and
 *325] consistently with the decision in *Cohen v. Huskisson*, amount to such a breach of the peace as justifies an arrest.

Judgment for defendant.

SAYER v. DUFAUR. Dec. 8.

Under stat. 5 & 6 Vict. c. 116, s. 1, if there be debts due to an insolvent who has petitioned and not yet obtained the final order for protection, the right of action is in the official assignee, not the insolvent.

On special demurrer to a plea setting up the title of such official assignee in answer to an action by the insolvent:

Held (The plea stating a petition filed by plaintiff with a schedule of his debts annexed), That such plea was not bad for want of a direct statement that debts were due from the plaintiff, or that the debt now sued for was included in his schedule.

Nor for omitting to aver directly that the notice to creditors was given after the passing of stat. 5 & 6 Vict. c. 116: it being alleged that the notice was "according to the true intent" of the statute.

Nor for omitting to show that a month had elapsed between the notice to creditors and the advertising of the time for hearing the petition. Per Lord DENMAN, C. J., if such time has not elapsed, the subsequent proceedings are not affected to the insolvent's prejudice.

Nor is the plea bad for omitting to show that the Commissioner who appointed the official assignee was himself appointed in a rotation established by order according to stat. 5 & 6 Vict. c. 116, s. 3, which order was approved of by the Lord Chancellor: or that the Commissioner, when he appointed the assignee, was acting in the matter of the particular petition.

ASSUMPSIT for wages due to plaintiff as the hired servant of and for the defendant; and for work and labour, &c., for money paid, and on an account stated.

Plea 4. As to the residue of the moneys in the declaration mentioned, and so much of the declaration as relates thereto: That, after the accruing of the causes of action as to which this plea is pleaded, and after the passing of an act," &c. (5 & 6 Vict. c. 116, "for the relief of Insolvent Debtors"), and after the day therein appointed for the act coming into operation, and after 1st November, 1842, and before the passing of an
 *326] act, *&c. (7 & 8 Vict. c. 96, "to amend the law of insolvency, bankruptcy, and execution"), and before the commencement of this suit, to wit, on, &c., the plaintiff presented a petition for protection from process to the Court of Bankruptcy in the said first-mentioned act mentioned and described as the Court of Bankruptcy, which petition, when presented, had annexed to it a full and true schedule of the debts of the plaintiff, with the names of his creditors, &c. (stating the contents of the schedule in the words of stat. 5 & 6 Vict. c. 116, s. 1); and which petition contained no proposal, the plaintiff having no such proposal to make, for payment, in whole or in part, of his debts. Averment that,

before the presenting of such petition, to wit, on, &c. (9th March, 1848), plaintiff "gave notice, according to the schedule to the said first-mentioned act annexed, and according to the true intent and meaning of" the said act "in that behalf," to one fourth in number and value of his creditors, that he intended to present a petition to the said Court of Bankruptcy, praying to be examined touching his debts, estate, and effects, and to be protected from all process upon making a full disclosure and surrender of such estate, &c., and that the time when the matter of the said petition should be heard was to be advertised in the London Gazette and in the Morning Post newspaper one month at the least after the date of the said notice; which notice at the time of its being so given, was in writing and signed by the plaintiff, and was in the words and figures following, viz., &c. The notice was then set out in the form given by the schedule. Averments, that, after the giving of such notice, and before the presenting such petition, plaintiff caused the notice *to be inserted twice, to wit, 9th and 12th March, 1848, in the [327 Gazette, and twice, to wit, &c. (same days), in a newspaper, &c. (following the terms of sect. 1). That for and during the period of twelve calendar months next before and at each of the said times respectively of giving the said notice and causing the same to be inserted, &c., plaintiff had resided, and did reside, in Middlesex, and within the district described in the first-mentioned act as The London district; and was not, at any of the times of the giving or inserting of any of the said notices, or at the time of the presenting of the said petition, or at any time, a trader within the meaning of the statutes, &c. (the then Bankrupt acts). That afterwards, and before the commencement of this suit, and before the passing of the said secondly mentioned act, to wit, on 16th March, 1848, the said petition was filed in the said Court of Bankruptcy in due form of law and according to the directions, &c., of the first-mentioned act. That, upon the filing, &c., and before the commencement of this suit, and before the passing of the secondly mentioned act, to wit, on the day and year last aforesaid, John Herman Merivale, Esquire, Barrister at law, then being the commissioner in rotation of the said Court of Bankruptcy who, by an order of the said Court theretofore, to wit, on, &c., in that behalf made by the said Court according to the directions and provisions of the said first-mentioned act, was appointed by the said Court to hear the matter of such petition, and to whom by the said order of the said Court the said petition was referred, by an order of him the said J. H. M. then in that behalf made by the said J. H. M. in the matter of the said petition, gave to the plaintiff protection from all process whatever, *either against his person [328 or his property of every description: and by which said order the said J. H. M., then being such Commissioner, directed and ordered that such protection was to continue in force, and that all process except process for arresting or holding to bail under the authority of a Judge's

order for that purpose was to be stayed, until 28th April, 1843, at two o'clock in the afternoon, being the time appointed for the appearance of the plaintiff at the said Court of Bankruptcy in Basinghall Street, London, and for the final examination of the plaintiff according to the form of the said first-mentioned act. Averment, that, upon the presentation of the said petition, and before the commencement of this suit, and before the passing of the said secondly mentioned act, to wit, on, &c., the said J. H. M., then being such Commissioner of the said Court of Bankruptcy so appointed to hear the matter of the said petition, and to whom the said petition was so referred as aforesaid, by an order then by him made in the matter of the said petition in due form of law and according to the directions and provisions of the said first-mentioned act, nominated and appointed George Green, then being an official assignee of the said Court of Bankruptcy, to be the official assignee of the estate and effects of the plaintiff according to the true intent, &c., of the said first-mentioned act and the provisions thereof in that behalf. And defendant says that the said G. Green always from the time of the making of the said order has been, and still is, the official assignee of the estate and effects of the plaintiff, and to all intents and purposes the sole assignee of the estate and effects of the plaintiff. Verification.

*329] To this plea there was a demurrer, assigning several *causes. (Those which it is material to notice will appear sufficiently by the argument.) Joinder.

Hawkins, for the plaintiff. The plea shows nothing which should preclude the insolvent from suing in his own name. At common law, if a chose in action has been assigned, the assignor must sue: and there is nothing in stat. 5 & 6 Vict. c. 116, to confer that right on the official assignee. Sect. 1 enacts only that on presentation of the insolvent's petition, "all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the Commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts." By the words "so much thereof as can be reasonably obtained and possessed without suit," the act seems evidently to contemplate that the assignee shall not bring actions. The words "estate and effects" cannot be strained to the extent of carrying rights of action. The statute cannot have greater force in this respect than a deed in the same terms would have. And, if the language of sect. 1 prevents the assignee from bringing actions, and yet the insolvent cannot sue, his rights of action are lost during the time between the petition and final order. The language of sect. 7, where the intention is to pass all rights to the assignee, differs strongly from

that of sect. 1: for in sect. 7 it is enacted "that from and after *the passing of the final order the whole estate, present and future, as well real as personal, and as well in the colonies, [*330 dominions, and plantations belonging to Her Majesty, as in the United Kingdom of Great Britain and Ireland, all the effects and all the credits of the petitioner, shall become absolutely vested in the official assignee, and assignee chosen by the creditors, without any deed or conveyance, which assignees shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under his fiat, and shall sue and be sued as if they had been assignees under such fiat." The present case, then, is like that of an ordinary assignment; and there, if an assignor sued, the defendant could not allege that the interest had been conveyed away. [PATTESON, J. Deeds of assignment which are meant to convey the interest in choses in action always contain a power to sue in the assignor's name. The present plea does not show that the assignor's name here is not used by the assignee.] That is one point made by the plaintiff. A party who obtains a protecting order may not get a final order, or even apply for it: but the act makes no provision for passing the estate and effects back to him from the assignee in whom sect. 1 vests them: nor does the insolvent obtain any allowance or any other benefit than protection to his person and property, till the final order is made. It may, therefore, be very essential that, in the mean time, he should have some power of getting in his debts. [COLERIDGE, J. Could he, during that time, give a release?] Perhaps he might. [COLERIDGE, J. You must go that length, if you contend that he can sue.] That is so. [PATTESON, J. The legislature cannot have intended that the debtors should in no case be sued between the petition and final order.] No one but the insolvent can sue. *[PATTESON, J. Even if the credits are vested in the official assignee, it would [*331 seem that if he cannot sue the insolvent must.] In the Bankrupt acts, 6 G. 4, c. 16, s. 63, and 7 G. 4, c. 57, ss. 11, 19, where it was intended that debts due to the bankrupt, or rights vesting in him, should pass to the assignees by the formal assignments then in use, express words were introduced for that purpose. Here "credits" are made to vest by sect. 7, but are omitted in sect. 1. [COLERIDGE, J. So they are in sect. 4, which describes the final order.] In *Jeffery v. M'Taggart*, 6 M. & S. 126, the words of a Scotch Bankrupt act (54 G. 3, c. 137) were held insufficient to transfer a chose in action, though they gave to the trustee (s. 29) the bankrupt's "whole estate and effects, of whatever kind," and "every right, title, and interest, which was formerly in the bankrupt," and (s. 26) authority to take steps for recovering possession.

Some other points are raised by the demurrer. There is no positive averment that the plaintiff had any creditors. [WIGHTMAN, J. Why did he petition if he had not? The plea shows that he had.] It does not appear that the schedule included this debt. [Lord DENMAN, C. J.

The defendant gives credit by his plea for the existence of this debt, and must be taken to include it among those which were referred to in the schedule.] It does not appear that the notice to creditors was given after the passing of stat. 5 & 6 Vict. c. 116. [WIGHTMAN, J. It could not well be "according to the true intent and meaning" of the act, if it was given before the act passed.] By the schedule annexed to the act, the time for hearing the petition is to be advertised one month at least after the date of the notice to creditors. It does not appear that *332] that time *elapsed before the hearing was advertised; nor correctly, when the hearing took place. [COLERIDGE, J. I find nothing in the body of the act requiring a month's notice. And the fixing of the time may be the act of the Court, not of the insolvent.] The plea should have explained that if it was so. [COLERIDGE, J. Sect. 13 gives the Judges and Commissioners of the Court of Bankruptcy a general power to make orders and rules for carrying the act into execution, and regulating, among other things, "the notification of the time of hearing petitions:" and these orders and rules, being approved of by the Lord Chancellor, are to be laid before Parliament, and to be binding unless disapproved of by resolution of either House.] This Court is not required to take judicial notice of them; and nothing is here stated as to any such rule or order. Again, it appears that the Commissioner was appointed according to a rotation established by order as required by sect. 3, but not that any such order was approved of by the Lord Chancellor. Nor, again, is it shown that the official assignee was nominated by a Commissioner "acting in the matter of the said petition," as required by sect. 1.

T. Jones, contra. The intention of stat. 5 & 6 Vict. c. 116, as declared by the last words of sect. 1, is to vest the estate and choses in action of the insolvent in the official assignee as those of a bankrupt are vested in his assignees by the Bankrupt Acts. The words "all the estate and effects," in the present act, are as large as the words "all the present and future personal estate" in stat. 6 G. 4, c. 16, s. 63; and, *333] under these last, it has been held that unliquidated damages for *non-performance of a contract became vested in a bankrupt's assignees; *Wright v. Fairfield*, 2 B. & Ad. 727.(a) In *Smith v. Coffin*, 2 H. Bl. 444, it was held that, under the then existing bankrupt laws, the right to bring a real action passed to assignees, notwithstanding the restrictive words "which he or she may lawfully depart withal" in stat. 13 Eliz. c. 7, s. 2. The words of the present act not only vest the interest in the official assignee, but, in effect, devert it out of the insolvent. It is suggested, however, on the other side that the action may, in point of fact, be that of the assignee suing in the name of the insolvent. But that is matter for a replication. If the plea casts a doubt on the plaintiff's title, and the fact which may remove such doubt (namely, in this case, that the plaintiff is suing as trustee) lies in the

(a) See cases collected in *Hill v. Smith*, 13 M. & W. 618.

plaintiff's own knowledge, it is for him to aver it. *Winch v. Keeley*, 1 T. R. 619, and *Dangerfield v. Thomas*, 9 A. & E. 292, furnish precedents for this. The presumption is that the plaintiff is not employed by assignees to sue in trust for them; those who rely on the contrary ought to show it.

As to the more minute objections. It is said that the plaintiff is not shown to have had any debts when he petitioned. [WIGHTMAN, J. Why then did he petition?] If he did so, he must have stated that he had debts: whether he had them or not is immaterial. [WIGHTMAN, J. And it does not lie within the defendant's knowledge.] It is objected that the notice to creditors does not appear to have been given after the passing of stat. 5 & 6 Vict. c. 116. [Lord DENMAN, C. J. It was given "according" to that act.] As to the *question whether [*334 notice is shown to have been given in such time that a month elapsed before the day of hearing was advertised; it is enough to say that the estate vests on the filing of the petition; what happens afterwards is matter of practice in the Court of Bankruptcy; and the defendant here cannot be affected by it, even if the insolvent be in fault. [COLERIDGE, J. The schedule to the act speaks of a month's notice; but sect. 1 does not require it.] (The Court did not think it necessary to hear further argument on the other objections.)

Hawkins, in reply. *Wright v. Fairfield*, 2 B. & Ad. 727, turned upon stat. 6 G. 4, c. 16, s. 63, the object of which enactment was to vest everything immediately in the assignees. So, under stat. 5 & 6 Vict. c. 116, when the final order is made, sect. 7 vests the credits as well as other estate in the assignees. But, in sect. 1 of this act, the object is only to protect the estate temporarily, in case of a final order being made; and therefore the official assignee is to "take possession of so much thereof as can be reasonably obtained and possessed without suit." The words "taken possession" do not apply to the recovery of a chose in action. And, if sects. 1 and 7 are co-extensive as to the interests vested in the assignees, the word "credits," in the latter, is superfluous. Then, the assignee not being enabled by sect. 1 to sue, the debt might be altogether lost if the insolvent could not bring an action; for the final order may be delayed by adjournment till the debtor himself is insolvent. To the suggestion that the *insolvent may be suing for his assignees, it is answered that this would be matter for a replica- [*335 tion; but it cannot be necessary for the plaintiff to show an equitable title; the legal one is sufficient. *Dangerfield v. Thomas*, 9 A. & E. 292, is not like this case. There the plea, that the plaintiff's assignees had become entitled to the debt by virtue of the fiat and assignment, was *prima facie* good; there was, however, an equitable title in parties other than the plaintiff; and this was an answer, the assignment passing only such things as the bankrupt was equitably as well as legally entitled to: but the want of equitable title in him was not to be presumed; and it

was right, therefore, to reply that fact. *Winch v. Keeley*, 1 T. R. 619, shows that a plaintiff may reply as was done there, but not that he must.

Lord DENMAN, C. J. All the objections in point of form have been removed by the Court during the argument, except that which turns upon the omission to show that a month elapsed between the notice to creditors and the advertisement of a hearing. But, whether that interval did not elapse, or whether there has been only an omission to state it, I think the insolvent is not, on such an account, to be excluded from the operation of stat. 5 & 6 Vict. c. 116, s. 1. And I am of opinion that this clause does not deprive the assignees of the right to bring the present action. The right cannot be in two persons at the same time: and the act says that, on presentation of the petition, "all the estate and effects of the petitioner shall forthwith become vested in the official assignee," *836] who "shall and *may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit," and "shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects" under the Bankrupt Acts. It is contended that the assignee cannot sue for a debt due to the bankrupt, because of the expression "so much" as can be reasonably obtained and possessed without suit." But this is an unreasonable use of not very reasonable words. To say, after vesting all the estate and effects in the official assignee, that he shall forthwith take possession of so much as can be reasonably obtained without suit, is very superfluous; and I do not see how a jury, if it became necessary, could say what a party could or could not reasonably obtain without suit. The words seem intended to hint that the assignee should lay hands upon what he can take without legal dispute; but not that he shall be disabled from suing for a debt. He is to hold and be possessed in like manner as official assignees in bankruptcy: and, if we go, for explanation of those words, to decisions on the Bankrupt Acts, we have one directly to the point in *Wright v. Fairfield*, 2 B. & Ad. 727, where Lord TENTERDEN, and LITTLEDALE and TAUNTON, Js., expressly hold that the assignee may sue for unliquidated damages due to the bankrupt, as part of the "personal estate" within stat. 6 G. 4, c. 16, s. 63. PARKE J., does not expressly say whether such damages may be recovered as personal estate or as a debt; but he states no dissent from the opinions previously given. An ingenious argument has been raised on the wording of sect. 7; but the language used there *cannot affect the direct operation of the vesting words in *837] sect. 1, nor deprive them of the force which was given to similar words in *Wright v. Fairfield*. What is there, indeed, to prevent their having that force? An unnecessary enactment. Sect. 1 had already done its work; then it is added in sect. 7 that, after final order, "the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to Her Majesty as in the United Kingdom of Great Britain and Ireland, all the effects and all

the credits of the petitioner, shall become absolutely vested in the official assignee, and assignee chosen by the creditors, without any deed or conveyance, which assignees shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under his fiat, and shall sue and be sued as if they had been assignees under such fiat." Unless reason is shown (and I think it is not) to suppose that "credits" are excluded from among the "estate and effects" mentioned in sect. 1, the large words of sect. 7 do not add a single particular to what is already given by the former section. It is an unfortunate process, too often adopted in the acts which have passed of late years in the month of August, to add words which only throw a doubt upon what goes before. On the assumption that the assignees cannot sue, an argument has been drawn from inconvenience, namely, that the insolvent must bring the action, or else there would be a time during which no action could be commenced. But the insolvent himself might be the last person whom the assignees would wish to possess that power: and I think *the [338 legislature did not intend that it should rest with him.

This being my opinion, it is unnecessary to enter into discussion as to the insolvent being supposed to sue in trust for others.

COLERIDGE, J.(a) Two questions arise: first, whether the chose in action is divested out of the plaintiff; secondly, whether, if any right to it remains in him, he or the official assignee can sue for it. The first only is material; for, if the right is out of the plaintiff, that is a sufficient answer to the action. It is more convenient that on filing of the petition the whole property should pass to the assignee at once; for much fraud, which the insolvent might otherwise practise, is so prevented: and it may be expedient that actions should be prosecuted by the official assignee without any delay. As to the meaning of the words "estate and effects" in sect. 1, we are referred by that clause to the Bankrupt Acts, 6 G. 4, c. 16, and 1 & 2 W. 4, c. 56;(b) and, under the first of these, unliquidated damages have been held to pass by the words "present and future personal estate." Those are not stronger than the words in sect. 1 of the present statute; for the word "future" does not apply to debts: a chose in action is a present interest; "future" denotes the case where the interest attaches at a subsequent time. Sect. 7 has already been observed upon by my Lord: it clearly means no more, as to the matter to become vested, than sect. 1 or sect. 4, which speaks of the same thing as sect. 7, and in so doing uses the words *"estate [339 and effects," on which there can be no doubt. The word "absolutely" in sect. 7 can have no new operation; for it applies as well to those matters which clearly vest under sect. 1 as to choses in action. The provision in sect. 7, again vesting the interests previously given to the official assignee, was probably added because, when a new assignee was introduced, it was thought necessary again to put in inceptive words.

(a) PATTERSON, J., had left the court.

(b) See sect. 25.

Whether or not the official assignee can sue, it is unnecessary to determine: but I do not understand a chose in action passing without such a power. The words supposed to be restrictive in sect. 1 mean only, as I think, that the assignee shall take whatever he has the means of taking immediately. It can hardly be said that the official assignee might not call upon a debtor to pay, or that, if the debtor thereupon paid, that would not be an answer to an action. On the other hand, if the insolvent only could enforce payment, he might sue and give a legal release. I am much of opinion, for the reasons I have suggested, that the official assignee may sue. On the question as to the insolvent suing as trustee I need not say anything.

WIGHTMAN, J. The substance of the plea is, that the chose in action is vested, not in the insolvent, but in another: and I think that the insolvent is not authorized to interfere in the recovery unless in behalf of that other. If he could, the statute might constantly be defeated, especially if a month at least must elapse before the hearing; for the insolvent might recover all choses in action in his own name; or, if his property lay in goods which a third person was possessed of and *re-
*340] fused to deliver, the assignee could not sue in respect of them, and the insolvent might recover for the whole in actions of trover.

Judgment for defendant

BANKS v. NEWTON. Dec. 9.

Plaintiff recovered a verdict, in this court, in debt, for a sum under 5*l*., upon which judgment was entered for debt, damages, and costs. Defendant brought error coram nobis, and assigned error that he resided in a district the residents in which, by statute (Brixton Court of Requests Act, 46 G. 3, c. lxxxviii., s. 14), were not liable to costs in any action for less than 5*l*., commenced in the courts of record at Westminster. The plaintiff below pleaded *In nullo est erratum*.

Held, that, on this record, the facts were admitted, and the cause assigned for error was sufficient. Judgment reversed.

"In the Queen's Bench.

"The," &c. (16th December, 1846).

"Middlesex, to wit. George Banks, the plaintiff," &c., "complains of Augustus Newton, the defendant," &c., "who has been summoned to answer the said plaintiff by virtue of a writ issued on Monday the 7th day of December, A. D. 1846, at the Court of our Lady the Queen, before the Queen herself, at Westminster, in an action of debt: and the plaintiff demands of the defendant the sum of 14*l*. 19*s*., which he owes," &c. "For that whereas the defendant, on," &c. First count, for 4*l*. 19*s*. for goods sold and delivered; second count, for 10*l*. on an account stated; damages, 5*l*. Plea: *Nunquam indebitatus*. Issue thereon.

"And, forasmuch as the sum sought to be recovered in this suit, and endorsed on the same writ of summons, does not exceed 20*l*., hereupon,

on the 24th day of December, A. D. 1846, pursuant to the statute in that case," &c., "the sheriff is commanded that he summon *twelve, [*841 &c., who neither, &c., who shall be sworn truly to try the issue above joined between the parties aforesaid; and that he proceed to try such issue accordingly: and, when the same shall have been tried, that he make known to the Court here what shall have been done by virtue," &c., "with the finding of the jury thereon endorsed, on" 1st January, 1847.

"Afterwards, on" 28th January, 1847, "came," &c. (appearance of parties). "And the said sheriff, before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an endorsement thereon, which said endorsement is in these words. Middlesex. Afterwards, on" 31st December, 1846, "before me," &c., "came the plaintiff named in the Queen's writ, hereto annexed, by his attorney therein named; and the defendant, although solemnly called, came not, but made default. And the jurors of the jury, by me duly summoned as therein commanded, also came; and, being duly sworn," &c., "on their oath said, That the defendant was indebted to the plaintiff in the sum of 4*l.* 18*s.*, parcel of the debt in the declaration in the writ mentioned demanded, in manner and form as therein alleged: and they say that the defendant never was indebted to the plaintiff in the residue of the said debt demanded; and they assessed the damages of the plaintiff on occasion of the detaining the said sum of 4*l.* 18*s.*, parcel, &c., over and above his costs and charges by him about his suit in that behalf expended, to 1*s.*, and for those costs and charges to 40*s.* The answer of," &c. (the sheriff).

"Therefore it is considered that the plaintiff do recover against the defendant his said debt of 4*l.* 18*s.*, and his damages aforesaid, on the occasion of the *detention thereof, to 1*s.*, together with his costs and charges aforesaid to 40*s.*, by the jurors aforesaid in form [*842 aforesaid assessed: And also 27*l.* 8*s.* for his said costs and charges, by the Court here adjudged of increase to the plaintiff, and with his assent. And the defendant in mercy, &c. And let the plaintiff be in mercy for his false complaint against the defendant for the residue of the said sum above demanded, and whereof the defendant is acquitted as aforesaid. And let the defendant go thereof without day, &c.

"Afterwards, to wit on" 1st February, 10 Vict., "comes here the said A. Newton, and brings into Court here a certain writ of our said Lady the Queen, for correcting," &c. (writ of error coram nobis). The record then stated an allowance of the writ, which was set out. "Afterwards, on" February 20th, 1847, "comes here" the plaintiff in error by his attorney, "and says that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit: That, before and at the day of the demanding of the said debt of 4*l.* 18*s.*, and of the commencement of the said suit by," &c., "to wit, on the 7th day of

December, A. D. 1846, and before and at the time of pronouncing the verdict and giving the judgment aforesaid, to wit, on the 28th of January, A. D. 1847, at Westminster in the county of Middlesex, the said A. Newton resided, inhabited, and kept his house within the western division of the hundred of Brixton, in the county of Surrey, that is to say at Heathfield in the parish of Wandsworth in the said division and county, within the jurisdiction of the Court of Requests in and for the said division hereinafter mentioned. And the said A. Newton further says that, *343] by virtue of his said "residence, inhabiting and keeping his said house, he was, at the said time of the demanding of the said debt, and commencement of the said suit, and giving the judgment aforesaid, and for a long time before then, to wit, from and after the 1st day of May in the said year 1846, by law, and by virtue of the statutes hereinafter mentioned, continually liable to be warned, and liable to be summoned, by the said George Banks, in respect of the said debt, before a certain Court of Justice, that is to say, the Court of Requests for the western division of the hundred of Brixton, during the said time usually holden, to wit, on Thursday in every week, at Wandsworth in the said parish of Wandsworth and western division," &c., "in the said county. And the said A. Newton further says that the said debt was, at the said time of the demanding the same, and the commencement of the said suit, to wit, on the said 7th day of December in the said year 1846, recoverable by the said George Banks in the said Court of Requests, by law and by virtue of certain Acts of Parliament then previously passed; that is to say, a certain Act passed," &c. (31 G. 2, c. 23, (a)), "and a certain other Act of Parliament, passed," &c. (46 G. 3, c. lxxviii., *344] "local and personal, public (b)). "And the said A. Newton further says that, by virtue of the premises, the said George

(a) "For the more easy and speedy recovery of small debts within the western division of the hundred of Brixton, in the county of Surrey."

Sect. 1 institutes "The Court of Requests for the Western Division of the Hundred of Brixton," with power "to hear and determine all matters of debt within the said Western Division of the Hundred of Brixton, where the debt in demand doth not amount to the sum of 40s."

Sect. 9 enacts that, if, in "any action of debt, or upon the case, upon any assumpsit for recovery of any debt," prosecuted against any person liable to be summoned in the said Court of Requests, in any of the King's Courts at Westminster, or elsewhere out of the Court of Requests, "the plaintiff shall declare for any sum not amounting" to 40s., the defendant may plead generally in bar that he was liable to be warned or summoned before the Court of Requests, &c.

(b) "To explain, amend, and extend the powers and provisions of an act, passed," &c. (ante, p. 343, note (a)).

Sect. 1 recites and partly repeals the previous act.

Sect. 2 gives to any five or more of the Commissioners jurisdiction where the debt shall not exceed 5l.

Sect. 9 gives to any person or persons, "whether residing within the said western Division of the Hundred of Brixton or elsewhere," who have any debt for which "they shall demand any sum of money not exceeding the sum of 5l., from any person or persons whomsoever, residing or inhabiting within the said western Division of the Hundred of Brixton, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the said western," &c., "to cause such debtor or debtors, person or persons, from whom such debt or debts shall be due or owing, or claimed or demanded, and so resident, inhabiting," &c., "to be

Banks, by reason of the said verdict, nor otherwise, ought by law to have, or be or is entitled to, any costs whatsoever in the said suit; but that, on the contrary thereof, the said G. Banks, by law, and by virtue of the said statutes, was and is entitled, by reason of the said verdict, to recover and have adjudged to him in the said suit the said several sums of 4*l.* 18*s.*, his said debt, and 1*s.*, his said damages, only; whereof the said G. Banks, before and at the said day of giving the said judgment, had due notice. Yet the said judgment is given against the said A. Newton, and in favour of the said G. Banks, to recover, as well his said debt of 4*l.* 18*s.*, and his damages *aforesaid on occasion of the detention thereof to 1*s.*, together with his costs and charges [*345 aforesaid to 40*s.* by the jurors aforesaid, in form aforesaid assessed, and also 27*l.* 8*s.* for his said costs and charges by the Court there adjudged of increase to the said plaintiff G. Banks, and with his assent, and the defendant in mercy, &c.; as appears by the record and proceedings thereof now remaining in the said Court; contrary to law and against the form of the statutes in such case," &c., "and to the great grievance of the said A. Newton: therefore in that there is manifest error." Verification. Wherefore he prays judgment, and that the judgment aforesaid, for the error aforesaid and in that respect, may be revoked, annulled, and holden for nought, and that the said Augustus Newton may be restored," &c.

"The eighth day," &c. (March, 1847).

"And hereupon the said G. Banks, by," &c., "his attorney, comes and says that there is no error either in the record and proceedings aforesaid or in the giving the judgment aforesaid: and he prays that the said justices," &c., "before the Queen herself here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed," &c.

The Plaintiff in error, in person. The judgment is bad for awarding costs. Sect. 14 of stat. 46 G. 3, c. lxxxviii., enacts that the plaintiff, in any action or suit commenced in a court of record at Westminster for any debt not exceeding 5*l.*, shall not, by reason of a verdict *for [*346 him, or otherwise, have or be entitled to any costs whatsoever. This enactment is not discretionary, but imperative. It was held, in the House of Lords, on a Scotch appeal, that, where an Act of Parliament directed a Court to give costs, it was ground of appeal that they were not given; *Tod v. Tod*, 1 Bligh, N. S. 639. A suggestion may be entered, to deprive the plaintiff of costs, after an award of speedy execution or summoned by personal service," &c.; giving the Commissioners the same powers as in the previous act.

Sect. 14 enacts: any action or suit shall be commenced in any of his majesty's Courts of Record at Westminster, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the said recited acts and of this act, or any or either of them, in the said Court of Requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever."

tion has been entered up under the order of the Judge who tries the cause; *Baddley v. Oliver*, 1 Cro. & M. 219, S. C. 8 Tyr. 145. *Hamley v. Hutton*, 5 Dowl. P. C. 382, shows that it is not necessary, under this statute, to plead the liability to the Court of Requests in bar, but that a suggestion may be entered, and that the defendant's residence in the district at the time of suit brings the case within the act.

Hoggins, *contra*. The fact of the residence does not appear on the proceedings below, but is first introduced on the record in the assignment of errors. [PATTERSON, J. Could not a defendant, who had appeared by attorney, assign for error that he was an infant?(a)] That is error in the process: and the appearance by attorney is shown on the record below. [COLERIDGE, J. The fact of infancy is introduced in the same way as the fact here.] Sect. 14 does not state how the plaintiff is to be deprived of costs: the regular mode would be by moving on affidavit to enter a suggestion: here that motion has been made and refused; *Banks v. Newton*, 4 D. & L. 682.(b) [COLERIDGE, J. The *347] plaintiff has joined in error. *WIGHTMAN, J. The fact assigned must be taken as true: you might have traversed it. PATTERSON, J. It is like error to reverse an outlawry: you may traverse the fact assigned; but, if you say *In nullo est erratum*, you admit the fact. COLERIDGE, J. In error *coram nobis*, it is assumed that we did right on the materials before us.]

Per Curiam,(c)

Judgment reversed.

(a) See note (4) to *Foxwist v. Tremaine*, 2 Wms. Saund. 212 a.

(b) *Bail Court*, Hil. T. 1847.

(c) Lord DUNHAM, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, Js.

FILLITER v. PHIPPARD. Dec. 9.

Sect. 86 of the Building Act, 14 G. 3, c. 78, which enacts that no action shall be maintained against any person in whose house, or on whose estate, any fire shall "accidentally begin," is not confined in its operation to those districts to which the limited clauses of the act are restricted.

It does not apply where a fire is produced by negligence: and, in that case, by the common law, an action lies against the party by whose negligence or that of his servants, a fire arises on his premises and damages the property of another.

It does not apply where the fire is lighted intentionally, and mischief happens to result.

CASE. The declaration stated that plaintiff, before and at the time of committing, &c., was lawfully possessed of a certain close of land, called, &c., situate and being in the parish of St. Martin, Wareham, in the county of Dorset, contiguous and next adjoining to a certain other close of land of defendant, called, &c., situate and being in the parish and county aforesaid, and then in the actual occupation and possession of defendant: and, during all the time aforesaid, plaintiff was also lawfully possessed of certain hedges, fences, gates and gate posts, to wit,

&c., then respectively standing and being in and upon the aforesaid close of plaintiff, and of great value, &c.: and, during all the time aforesaid, plaintiff was also lawfully possessed of certain trees, saplings, &c., to wit, &c., then respectively *standing, growing, and being in and [*848 upon the aforesaid close of plaintiff, and of great value, &c.: and thereupon it became and was the duty of defendant not to commit the grievances respectively hereinafter mentioned. Yet defendant, well knowing the premises, not regarding his said duty, but contriving, &c., to injure, &c., plaintiff, heretofore, to wit, on, &c., wrongfully lighted and kept, and caused and procured to be lighted and kept, in and upon his said close (to wit, upon that part of it called, &c.), a certain fire, in such a careless, negligent, and improper manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do, to wit, on, &c., that, by and through the mere negligence, carelessness, and improper conduct of defendant and his servants in that behalf, and for want of due and proper care and caution on his and their part, the said fire then, to wit, on, &c., extended itself from and out of the said close of defendant to, into, and upon the aforesaid close of plaintiff, and to, into, and upon the said hedges, &c., of plaintiff; and thereby the hedges, &c., respectively, of plaintiff, of the value aforesaid, then became ignited and caught fire, and were then respectively much burnt, damaged, and destroyed; and, by means of the premises, the said close and property of plaintiff then became and was much disfigured, damaged, and deteriorated in value. And, by means of the premises, plaintiff, in order to prevent the said fire from further extending and doing further and greater damage to his said close and property, was then forced and obliged to pay, and did then necessarily pay, &c., divers sums of money, amounting, &c., in and about extinguishing the said fire, and staying and preventing the further progress and extension thereof to *other parts of the said close and property of plain- [*849 tiff. To the damage, &c.

The defendant pleaded three pleas, which led to issues of fact.

The cause was tried before CRESSWELL, J., at the Dorsetshire Spring assizes, 1847, when a verdict was found for the plaintiff.

In Easter term, 1847, *Kinglake*, Serjt., obtained a rule nisi for arresting the judgment: and the Court ordered that the case should be put down in the special paper.

Barstow now showed cause. (a) The declaration shows a good cause of action. The law is thus laid down by Blackstone, 1 Com. 431. "By the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise,

(a) Before Lord DENHAM, C. J., COLERIDGE and WIGHTMAN, JR. PATTERSON, J., had gone to chambers. The case was heard as on a confiduum; and the counsel opposing the rule had the reply; but two counsel were, by arrangement, permitted to be heard in support of the rule.

if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service; and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Ann. c. 8,(a) which ordains (b) that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. But (c) if such fire happens through negligence of any servant (whose loss is *350] *commonly very little), such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labour for eighteen months." Now, as to the common law, it was held, in *Vaughan v. Menlove*, 3 New Ca. 468, that if a party negligently construct a hay rick on the extremity of his land, and it take fire spontaneously, and his neighbour's house be thereby burnt, an action lies against him at the suit of the neighbour. In the argument of that case, as reported by Mr. Scott,(d) reference was made to a case tried in Berkshire before ALDERSON, J., where the same principle was taken for granted. As to stat. 6 Ann. c. 31, s. 6, Blackstone certainly assumes that the words "accidentally begin" include a case of fire caused by negligence, probably understanding the words as excluding only intention. This passage was the subject of comment in Lord LYNDEHURST's judgment in *Viscount Canterbury v. The Attorney-General*, Phillips's Ch. R. 306, 315. No direct decision was there given: and it is pointed out that the statutes were not referred to in either *Vaughan v. Menlove*, 3 New Ca. 468, S. C. 4 Scott, 244, or the case there cited. Then stat. 14 G. 3, c. 78,(e) s. 86, enacts "that no action, suit, or process whatever, shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the said twenty-fourth day of June" (1774), "accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding:" and the defendant is empowered to plead the general *issue, and is to have treble costs if the *351] plaintiff be nonsuited, or discontinue, or have a verdict against him. The same question would arise here as upon stat. Ann. c. 31, s. 6, with respect to the words "accidentally begin." But, further, stat. 6 Ann. c. 31, s. 6, relates to "house or chamber" only. It is true that stat. 14 G. 3, c. 78, s. 86, introduces the words "on whose estate:" but the statute is the Building Act for London and the adjacent district, and refers (sect. 1) to stat. 12 G. 3, c. 73, the previous Building Act, where there is a similar clause, sect. 37, as to "house or chamber" only. It seems to follow that the intention of the legislature was to enforce these provisions in the districts

(a) *Sic*; a mistake for 31.

(b) Sect. 6.

(c) Sect. 3.

(d) 4 Scott, 244, 248.

(e) Repealed in part, but sects. 84, 85, and 86 (among others) kept in force, by stat. 7 & 8 Vict. 34, sect. 1 and sched. (A).

only to which the Building Acts relate. Indeed, stat. 6 Ann. c. 31, seems to be confined to London and Westminster, and places within the bills of mortality. Here the property is not shown to be within those districts: and the place is laid, without a videlicet, in Dorsetshire. It is true that, in the Building Acts, some of the clauses are expressly confined to places within the limits: but it cannot be inferred from this that a larger application was intended where the restriction is not expressed, especially in the case of statutes which have often been said to be inaccurately worded. Some stress may perhaps be laid on the language of sect. 84 of stat. 14 G. 3, c. 77, where the penalty is imposed on servants for fires occasioned by their carelessness "within the limits aforesaid, or elsewhere." But the application of sect. 85 is restricted to fires breaking out "within the limits aforesaid." And sect. 85 of stat. 12 G. 3, c. 78, restricts the penalty on servants in the same way, thus leading to the conclusion that a similar restriction was intended in sect. 3 of stat. 6 Ann. c. 13, where, nevertheless, no restriction is expressed, the words being "any dwelling-house, or out-house or houses." *Taking these three acts in *pari materia* together, it seems unsafe to give [*352 an unrestricted application to any one clause. Further, the fire, as described in the declaraton, was not accidental in its origin. It was intentionally kindled, but did mischief through the negligence complained of. The materiality of the allegation of negligence appears from *Piggot v. the Eastern Counties Railway Company*, 3 C. B. 229. The negligence makes the defendant a wrongdoer.

Kinglake, Serjt., and *Stock*, contra. Sect. 86 of stat. 14 G. 3, c. 78, is general in its application. The title of stat. 6 Ann. c. 31, "for the better preventing mischiefs that may happen by fire," is quite general: and it is not attempted to show that sect. 6 of that act contains any words suggesting a restriction. Where the provisions of stat. 14 G. 3, c. 78, are not meant to be general, an express restriction appears: and the clause (s. 87) in the act 12 G. 3, c. 78, corresponding with sect. 86 of the later act, is also quite general. In *Richards v. Easto*, 15 M. & W. 244, PARKE, B., in delivering the judgment of the Court, said that stat. 14 G. 3, c. 78, "is not of a local and personal character *only*: some of the clauses affecting all the Queen's subjects, as the 84th and 86th, relating to accidental fires; and the statute is, in that respect, public." As to the other point, if the words "accidentally begin," in sect. 86 of stat. 14 G. 3, c. 78, were not meant to include the case of negligence, the provision there, and in the earlier statutes, was unnecessary. Blackstone's opinion, that negligence is accidental in the statutable sense, is not overruled by *Vaughan v. Menlove*, 3 New Ca. 468; for there, as Lord *LYNDHURST pointed out (1 Phil. Ch. C. 320), the statute was not referred to. It seems that sects. 84 and 86 were intended [*353 to punish the servant and relieve the master in the same case: the former expressly includes negligence; the latter, therefore, does so im-

pliedly. *Piggot v. The Eastern Counties Railway Company*, 3 C. B. 229, is inapplicable: the damage there arose from an engine in motion.

Barstow, in reply. In that case the engine was on the land of the defendants; so that the fire might be said to arise there. The language of PARKE, B., in *Richards v. Easto*, 15 M. & W. 244, was used with reference to pleading the general issue under statute. Sect. 84 may perhaps be open to the remark made in the judgment: but not sect. 86, which is unnecessarily mentioned. That the statutes, excluding from liability cases of mere accident without negligence, were not superfluous, appears clearly from *Turberville v. Stamp*, 1 Comyns's R. 32, S. C. 1 Salk. 13, where it was held that an action lay without showing a special negligence.

Cur. adv. vult.

Lord DENMAN, C. J., in this vacation (December 11th), delivered the judgment of the Court.

This was a motion in arrest of judgment, on a declaration stating (with some other particulars) that the plaintiff was possessed of a close in which certain hedges and gates were standing, and several trees growing; that the defendant was possessed of an adjoining close; and that the defendant made and kept a fire in his close in such a negligent manner, and at *354] a time *when, by reason of the then state of the wind and weather, it was dangerous and improper so to do, that, through the negligence and improper conduct of himself and his servants, and for want of due care and caution, the said fire extended itself out of his close into plaintiff's, and the plaintiff's trees, hedges, fences, &c., were burnt and destroyed.

The ancient law, or rather custom of England, appears to have been that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss. And it is well established that, where the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer. And the case of *Turberville v. Stamp*, 1 Comyns's R. 32, S. C. 1 Salk. 13, the last decided before stat. 6 Ann. c. 31, makes this plain, and declares the same principle where the fire originates in the defendant's close. The Act contemplates the probability of fires in cities and towns arising from three causes, the want of water, the imperfection of party walls, and the negligence of servants. The Act provided some means for supplying these material defects: but the third section was directed against the moral one, the carelessness or negligence of servants, which (it observes) often causes fires: and it imposes on *the servant* by whose negligence the fire may have been occasioned a fine of 100*l.*, to be distributed among the sufferers at the discretion of the churchwardens, or imprisonment for eighteen months in case of non-payment. The clause, raising the same sum whatever the extent of suffering and the number of the sufferers,

and inflicting the same penalty to whatever degree the *negligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the legislature. The most usual cause of fires was assumed to be the negligence of servants: and the enactment might operate to induce habits of caution in that important class. The same statute, in the sixth section, enacts that, after a day named, no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered or occasioned thereby. [*855]

Both provisions seem to have found favour with the legislature; for both were re-enacted by stat. 12 G. 3, c. 73, and stat. 14 G. 3, c. 78; (a) the latter (s. 86) adding, to the words "house or chamber," "stable, barn, or other building;" and also the words "or on whose estate."

No terms can be more comprehensive. We cannot doubt that Baron PARKE, in *Richards v. Easto*, 15 M. & W. 244, rightly viewed it as a general law. And, though the word "estate" is used in a sense very different from that which it bears in the language of the law, it clearly applies to land not built upon, and makes the owner of such land liable in the same manner as it had previously the owner of buildings.

The question then is upon the meaning and effect of the word "accidentally," here applied to fire. And here a very singular doubt has arisen from the mode in which this enactment is discussed by Sir William Blackstone in his Commentaries. The passage is introduced *by that learned writer incidentally, as an illustration of the principle [*856] on which masters are held responsible for the acts of their servants. (b) "Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service." "But now" (he proceeds) "the common law is altered by statute 6 Ann. c. 3" (it should be c. 31, ss. 3, 6), "which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness." This reason, by the way, is not stated in the Act of Parliament, and must be allowed to be very far from satisfactory; because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers. Besides, making servants punishable for fires resulting from their negligence is no exemption of masters from responsibility for the same fault; for fires which *accidentally begin* are not fires produced by negligence.

It would, therefore, appear that Blackstone had drawn a conclusion

(a) Sects. 84 and 86 are also retained without alteration by stat. 7 & 8 Vict. c. 84, s. 1, and sched. (A).

(b) 1 Bla. Com. 431.

from the enactment cited, which it by no means sustains. Lord LYNDEHURST, however, has in some degree sanctioned by his high authority the inference thus drawn by Blackstone, in the remarks by which he prefaced his decision against Lord Canterbury's petition of right.^(a) We must, however, observe that those remarks are wholly unnecessary for the decision to which he came, and indeed are stated rather as arguments *357] with which that petitioner would have had to contend, *if his cause had come to a hearing on the merits, than as expressing a deliberate opinion.

It is true that, in strictness, the word *accidental* may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters. And, when we find it used in statutes which do not speak of wilful fires but make an important provision with respect to such as are accidental, and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think the plaintiff's construction much the most reasonable of the two.

Lord LYNDEHURST remarked on the absence of decisions on this point. Yet he mentions two cases, both surely entitled to great weight, one tried before ALDERSON, J., in Berks, the other before PATTERSON, J., in Salop, which latter was very fully discussed on a rule to show cause, and decided by the whole Court of Common Pleas.^(b) In both these cases a plaintiff recovered damages for a fire spreading to his corn from the defendant's field through the negligence of the defendant and his servants. His Lordship says that stat. 14 G. 3, c. 78, escaped notice on those occasions. But, if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be the *358] universal impression of the eminent lawyers, both *at the bar and on the bench, who took part in the argument and judgment, that the clause in the Building Act respecting accidental fires cannot apply to such as are produced by negligence.

It may be further observed, with reference to this doctrine, that the exemption given by this enactment cannot apply. Its words suppose the fire to begin accidentally on the estate of him from whose estate it spreads. Now this fire did not begin accidentally, but was knowingly lighted by the defendant himself.

Judgment for plaintiff.

(a) 1 Phil. Ch. R. 396.

(b) Vaughan v. Menlove, 3 New Ca. 468.

MILLS v. BLACKALL. Dec. 10.

Declaration in assumpsit recited that, at the time of the making the agreement after mentioned, defendant was possessed of a ship, and plaintiff was a master mariner having interest at N. in the West Indies for loading a vessel; and that, it having been proposed by plaintiff to defendant that defendant should give plaintiff the command for a voyage to the W. I. and back, it was agreed in writing, between plaintiff and defendant, that, "*in consideration of plaintiff having interest in N. for loading, &c., defendant would give plaintiff the command, 'with the understanding that the plaintiff would use all possible exertion for the benefit of the ship;'*" "*and that, for such services,*" defendant would pay plaintiff the sum, &c. The declaration then averred mutual promises to perform the agreement; that plaintiff had performed it; that defendant gave to plaintiff, and plaintiff set out in, the command of the vessel, and plaintiff performed the voyage out and discharged the outward cargo, provided a homeward cargo (adding some details in these respects), performed the voyage home, discharged the homeward cargo, and resigned the command, and, during all the time, "*used all possible exertions,*" &c.: breach, non-payment by defendant to plaintiff.

Held, on demurrer to a plea, a good declaration, as sufficiently showing that defendant undertook to pay plaintiff if he would take the command and use all possible exertion.

Plea: that the plaintiff did not use all possible exertions, in manner, &c. Held bad, on special demurrer, as not going to the whole consideration.

ASSUMPSIT. The first count of the declaration stated that, whereas, at the time of the making of the agreement after mentioned, defendant was possessed of a certain ship or vessel, called the Cuba, then lying at the port of London; and plaintiff was a master mariner, having interest in the Island of Nevis *in the West Indies for loading a vessel; [359 and it having been proposed by plaintiff to defendant that defendant should give plaintiff the command of the ship for a voyage from London to the West Indies and back, thereupon, heretofore, to wit, on 16th January, 1845, by an agreement in writing then made between plaintiff and defendant, it was agreed that, in consideration of plaintiff having interest in Nevis aforesaid for loading a vessel, defendant would give plaintiff the command of the ship with the understanding that the plaintiff would use all possible exertion for the benefit of the ship and owners thereof; and that, for such services, defendant would pay plaintiff the sum of 8*l.* 8*s.* per month during the command by the plaintiff, and also 5*l.* per month during the voyage, to wit, the voyage in the preliminary part of this count mentioned, for finding the cabin in requisites and cuddy stores, and also 30*l.* for horse hire and contingent expenses in the West Indies, with outward primage, and the usual and customary homeward primage; the cabin to be at the service of plaintiff, as also the profit of passage money, if any, therein, plaintiff finding all the requirements thereof. And, the said agreement being so made, afterwards, to wit, on, &c., in consideration of the premises, and that plaintiff, at the request of defendant, then promised defendant to observe and perform all things which, according to the said agreement, were by and on the behalf of plaintiff to be observed or performed, defendant promised plaintiff, &c. (the like promise by defendant). Averment, that plaintiff has observed and performed all things which, according, &c. That afterwards, to wit, on, &c., in pursuance of the agreement, defend-

*360] ant gave plaintiff the command of the said ship; *that afterwards, to wit, on, &c., plaintiff set out, in command of the ship, from London aforesaid on the voyage aforesaid: and that the ship carried an outward cargo from London to be delivered at divers ports and places in the course of the said voyage, to wit, to be delivered at the Island of Canary on the coast of Africa, and at the said Island of Nevis, and at the Island of St. Kitts, in the West Indies. That plaintiff safely discharged and delivered the said cargo at the destination thereof, to wit, at the several places last aforesaid. That the sum earned by the said ship for freight, in respect of the said outward cargo, amounted to a large sum of money, to wit, 120*l*. That, having so as aforesaid set out on the said voyage, plaintiff duly performed and completed the same; and, having so completed the said voyage, he then resigned the command of the said ship or vessel into the hands of defendant as hereinafter mentioned. That, in the prosecution of the said voyage, plaintiff arrived at the said Island of Nevis; and, finding that a homeward cargo was not likely to be obtained there for the ship without disadvantage to the ship and owners from delay, plaintiff, in the prosecution of the said voyage, proceeded thence with the said ship to the Island of Porto Rico in the West Indies, and there procured a full homeward cargo for the ship, to wit, a cargo of 474 hogsheads of sugar. That, having procured the said cargo, plaintiff took in the same at Porto Rico, and set out home, and carried the said cargo from Porto Rico home, to wit, to London, and arrived there heretofore, to wit, on 24th June, in the year aforesaid. That afterwards, to wit, on 28th June, in the year aforesaid, plaintiff safely discharged and delivered the said cargo there, and then resigned the *361] *command of the said ship into the hands of defendant, who accepted the said resignation. That, during all the time from the time when the command of the ship was given him until the time when he so as aforesaid resigned the said command, plaintiff used all possible exertions for the benefit of the ship and of the owners thereof. That the said time during which he had the said command of the ship amounted to a great many months, to wit, to six months: and that the said time during which the said voyage continued, amounted to a great many months, to wit, six months. That plaintiff found the cabin during all the said voyage in requisites and cuddy stores. That plaintiff incurred great expenses for horse hire and contingent expenses in the West Indies, to wit, 30*l*. That outward primage is at and after the rate of certain percentage, to wit, of 5*l*. per cent. upon the sum earned for freight in respect of the said outward cargo; and that the usual and customary homeward primage upon the said homeward cargo is at and after the rate of a certain sum of money, to wit, 6*d*. for every hogshead, so as aforesaid carried from Porto Rico and discharged and delivered at London. Of all which premises defendant, from time to time, had notice.

That, although a large sum of money, to wit, the sum of 53*l.* 9*s.* 5*d.*, has accrued due to plaintiff from defendant in pursuance of the said agreement, at the rate of 8*l.* 8*s.* per month for every month during the said command by him of the ship, to wit, for six months, at and after the rate aforesaid, and although another large sum of money, to wit, 26*l.* 16*s.* 8*d.*, has accrued due to him from defendant, in pursuance of the said agreement, at the rate of 5*l.* per month for every month during the said voyage, to wit, for six months at and *after the rate aforesaid, and although another large sum of money, to wit, 80*l.*, has accrued due to him from defendant, in pursuance of the said agreement, for horse hire and contingent expenses in the West Indies, and although another large sum of money, to wit, 6*l.*, has accrued due to him from defendant in pursuance of the said agreement for primage on the said outward cargo, at and after a certain percentage on the amount earned for freight, to wit, on the sum of 120*l.* at and after the rate of 5*l.* per cent. upon the said sum of 120*l.*, and although another large sum of money, to wit, 11*l.* 17*s.*, has accrued due to him from defendant, in pursuance of the said agreement, for the usual and customary homeward primage on the said homeward cargo, at and after the rate of a certain sum of money, to wit, 6*d.* per hogshead for every hogshead of sugar of the said homeward cargo so carried and discharged and delivered as aforesaid, and although defendant has from time to time had due notice of all the premises, and although reasonable time has elapsed before the commencement of this suit for payment by defendant to plaintiff of the said several sums of money respectively, and although defendant has been often requested to do so, yet defendant has disregarded his promise, and has not paid plaintiff the said several sums of money respectively, or any part thereof. [*362]

Plea 4, to the first count. That plaintiff did not use all possible exertions for the benefit of the ship or of the owners thereof, in manner and form, &c. Conclusion to the country.

Demurrer, assigning for cause, that the plea treats the matter therein traversed as a condition precedent, upon the face of the first count, to the right of the plaintiff to *recover upon the agreement; whereas, in truth and law, it is not a condition precedent thereto. Also that the plea traverses an immaterial averment, and offers an immaterial issue. Also that it is uncertain whether the plea denies or confesses the contract or promise in the count stated; and the defendant ought to have made it appear whether he denies or confesses the same. [*363]

Joinder in demurrer.(a)

Henry Mills, for the plaintiff. First, the declaration is good. The consideration might perhaps have been more technically set forth: but the effect is, that there is a mutual agreement, that the plaintiff under-

(a) Other pleas were demurred to, which, upon argument, were abandoned by the counsel for the defendant.

takes to perform all the duty which the agreement throws on him, and that this undertaking is the consideration for the defendant's promise. "It has been held on motion in arrest of judgment, that a declaration in assumpsit, which stated an agreement, between the plaintiff and defendant, but omitted the mutual promises, was sufficient, and the Court said an agreement was a promise:" 1 Chitt. Pl. 308 (7th ed.), citing *Mountford v. Horton*, 2 N. R. 62. This declaration therefore would have been good even without the averment of mutual promises. [COLERIDGE, J. The agreement is that the defendant will pay the plaintiff "for such services;" what are they?] Taking the command of the vessel. [WIGHTMAN, J. There is no agreement by the plaintiff that he will do so.] He clearly does so agree, upon the fair construction of the whole instrument. [PATTERSON, J. There is also "the understanding that the *plaintiff would use all possible exertion for the *364] benefit of the ship." That is clearly an agreement which could have been enforced against the plaintiff.

Next, the fourth plea is bad. The using of all possible exertions was not a condition precedent to the defendant's obligation: any failure in this respect on the part of the plaintiff would properly be the subject only of a cross action. On any other view, the slightest falling short of the fullest attainable cargo would be an answer.(a) *Stavers v. Curling*, 3 New Ca. 355, is directly in point.

Ogle, *contra*. The declaration shows no consideration for the defendant's promise. It cannot be inferred that the plaintiff had entered into any agreement. No declaration could here be framed against the plaintiff for failing to take the command. [PATTERSON, J. The mutuality of obligation is not a sound criterion. In a contract of guarantee for further advices to a third person, the plaintiff is not always bound to make the advances; but the duty to see him harmless arises upon the advances being made. Here, supposing the contract to mean that the defendant will pay if the plaintiff takes the command, &c., your criterion is inapplicable.] All that was contemplated was that the plaintiff should use his interest on behalf of the ship. [COLERIDGE, J. To "use all possible exertion" is no more than the ordinary duty of the master.(b) Then, striking out that part, have we not the mere agreement, that if the plaintiff will take the command the defendant will pay him?] The declaration is not for work and labour: *the question on this special count is as to the liability of the parties at the moment the contract was completed. [COLERIDGE, J. It is a count for work and labour, unnecessarily expanded.]

Next, the plea is good. If, as is contended on the other side, the defendant's liability arises on the plaintiff's performance, and not on the mutual duties at the time of making the contract, a traverse of the

(a) See *Havelock v. Geddes*, 10 East, 555; *Cliphsham v. Vertue*, 5 Q. B. 265.

(b) See *Stilk v. Meyrick*, 2 Campb. 317; *England v. Davidson*, 11 A. & E. 356.

performance negatives the liability: as, if the promise were to pay money on the plaintiff going to Rome, it would be an answer that he had not gone.

H. Mills, in reply, was stopped by the Court.

LORD DENMAN, C. J. I have no doubt that the declaration shows a right to recover. My brothers, also, think the fourth plea bad. And, certainly, if work has been done under the contract by which the defendant has profited, though not to the full extent of the contract, the partial failure is ground, not of defence, but of a cross action.

PATTERSON, J. It is quite allowable to state an agreement, and aver mutual promises to perform it. That is objected to here, because, it is said, the liability of the plaintiff, as arising upon the agreement set forth, could not be described in a declaration. But it is a constant practice to declare in this way on policies of assurance, where it would be very difficult to describe the exact duty of the plaintiff. Then, do we find here a good consideration for the defendant's promise? The words of the agreement, "in consideration of the plaintiff having interest," &c., must not be *understood as a technical description of the con- [*366 sideration of the contract; they show only what induced the defendant to employ the plaintiff. The consideration for the defendant's promise was that the plaintiff should take the command and use all possible exertions. Then the plea traverses the using all possible exertions: but that is a part only of the consideration: we therefore come back to the question whether the declaration be good on general demurrer. I think the agreement intelligible on its face, and that its meaning may clearly be collected by a lawyer, or by an ordinary person.

COLERIDGE, J. I am entirely of the same opinion on both points. I never had any doubt as to the plea. Mr. *Ogle* put the case of money agreed to be paid on a party going to a given place, and a traverse of such going: but there the traverse would be of the whole consideration; here it is only of a part. As to the declaration, I own I felt some difficulty from the way in which it is drawn, which perhaps is owing to the timidity of the pleader. But I feel no doubt now that the meaning of the agreement is, "if you will accept the command and use your utmost exertions I will pay you." There is no mutual liability till the plaintiff has taken the command; but then it arises.

WIGHTMAN, J. Mr. *Ogle's* objection, that there is no mutual liability, would be of great weight if the action were brought for non-performance of an executory agreement. But here the agreement has been performed on one side. Many instances may be put of a liability which does not arise at the moment of making *the contract, as in the [*367 case mentioned, of a guarantee where the party to whom the guarantee is given is not bound to make the advance.

Judgment for plaintiff.

The Churchwardens and Overseers of the Poor of ST. NICHOLAS,
DEPTFORD, v. SKETCHLEY. *Dec. 11.*

Reported, 8 Q. B. 394.

The case of *Campbell v. The Queen (In Error)*, in the Queen's Bench and Exchequer Chamber (decided in the latter Court on December 3d, in this vacation) will be reported with *Ryalls v. The Queen*, Hilary vacation, 1848, post.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Hilary Term and Vacation,

XI VICTORIA. 1848.

THE Judges who usually sat in Banc in this Term and Vacation were,
Lord DENMAN, C. J. COLERIDGE, J.
PATTESON, J. WIGHTMAN, J.

PENNIAL v. HARBORNE. Jan. 11.

Under a lease with a proviso of forfeiture if the covenants be broken, forfeiture is incurred:

1. If the lessee covenants to insure the buildings from time to time and at all times, and leaves a part uninsured for two months after execution of the lease. Nor is it any answer that the greater part of the premises were already insured at the requisite amount (1400*l.*) by a policy expiring at the end of the two months, and that on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount (1700*l.*):
2. If the covenant be to insure against fire in the names of the lessors, A., B., and C., and the lessee adds his own. Nor is it any answer that, by stat. 14 G. 3, c. 78, s. 83, any person interested in the buildings may require that the insurance company shall cause the insurance money to be laid out in rebuilding. Especially where the covenant contains an express provision that the insurance money shall be so laid out, and that the lessee shall supply what is deficient.

If a lessee, having incurred these forfeitures (though the lessor has taken no step to enforce them), contracts to sell his term, the purchaser, on becoming acquainted with them, may refuse to complete his contract, and may reclaim his deposit.

ASSUMPSIT. The declaration stated an agreement between plaintiff and defendant, whereby defendant, representing that he was possessed of a certain *dwelling-house, &c., for the residue of a term of [369 years, agreed and promised, in consideration of deposit and purchase-money, to furnish and adduce a proper title, and well and effectually to assign to plaintiff the lease of the said dwelling-house, &c., and

all defendant's right, title, &c., for the remainder of the term then to come, &c. Breach: that defendant did not, when requested, or at any time, furnish or adduce a proper title, &c.; whereby plaintiff was deprived of the advantages which would have resulted from the purchase, and was put to expense in endeavouring to procure a title, &c. Counts for money had and received, and on an account stated.

Pleas. 1. Non assumpsit. 2. A plea not now material. 3. That defendant did, when requested by plaintiff so to do, and within a reasonable time, &c., furnish and adduce a proper title to the said premises. Conclusions to the country. Issues thereon.

On the trial, before Lord DENMAN, C. J., at the Sittings in London after Michaelmas term, 1846, it appeared that, in November 1842, an agreement was executed between William Walker Gretton, Stephen Amand Wright, and John Wilson, trustees under the will of John Gretton, of the first part, Emma Haffner, the cestui que trust, of the second part, William Belton of the third part, and Peter Belton of the fourth part; whereby, after reciting that William Belton was already assignee of a term of thirty years from Michaelmas 1814 in the after-mentioned houses and premises, situate in the Mile End Road, in the parish of St. Dunstan, Stepney, and that the parties of the first part, with the consent of Emma Haffner, had acceded to W. Belton's request that they should grant him a lease as after mentioned, it was witnessed that W. Belton *370] covenanted and agreed to pull down the said houses and premises and build other tenements in their stead, &c., and to insure in manner after mentioned, in the joint names of the then trustees: and it was further agreed that, on completion of the buildings, &c., the trustees would grant W. Belton a lease for sixty-one years from September 29th, 1844. W. Belton built on the premises according to the agreement, and erected a public-house (the White Swan), another house, and ten cottages, which cottages he underleased to a person named Ayley for a term one year short of the sixty-one years above mentioned. At that time Belton had not obtained his own lease; but the lease, conveying the newly built messuages and the ten cottages, (a) was afterwards executed, bearing date 15th April, 1845; the parties being W. W. Gretton, S. A. Wright, and William Knottesford Gretton (the trustees then acting in the execution of John Gretton's will), of the first part, Emma Haffner (who testified her consent by execution), of the second part, and William Belton,

(a) The premises were described as "all that messuage or tenement known or called by the name of the White Swan public-house, and lately rebuilt by the said William Belton upon the site of two ancient messuages or tenements which were afterwards converted and for many years occupied as one, and used as a public-house, situate, &c., "and now in the occupation of the said W. Belton; and also all that messuage or tenement on the west side of the said public-house and adjoining thereto, also rebuilt by the said W. Belton upon the site of an ancient messuage or tenement, and now in the occupation," &c.: "and also all those ten cottages or tenements with the appurtenances in the rear thereof, forming a yard or alley called Swan Yard: together with all ways," &c.

of the third part. There was a covenant to insure, in the following words:

"And also" the lessee, his executors, &c., "shall and will, at his and their own costs and charges, from time to time and at all times during the *continuance of the said term, insure and keep [*371 insured all the said premises from damage by fire in the Licensed Victuallers' Fire Office, London (or, if such office shall be discontinued, then in some public office for assurance in London or Westminster to be approved of by the said W. W. Gretton, S. A. Wright, and W. K. Gretton, their heirs and assigns), in the joint names of the said W. W. Gretton, S. A. Wright, and W. K. Gretton, their heirs and assigns, in the manner following, that is to say: the said messuage or public-house and appurtenances thereto belonging in the sum of 1000*l.*, the said messuage or tenement adjoining in the sum of 400*l.*, and the said cottages in the rear in the sum of 300*l.*, in equal proportions. And it is hereby agreed that the moneys to be recovered by virtue of any such insurance shall be expended in reinstating the said premises in case of damage by fire, as far as the same will extend; and, in case the amount recovered from such insurance shall not be sufficient for that purpose, then he, the said W. Belton, his executors, &c., shall, within six months from the happening of every such accident, and from time to time during the said term, so often as any such accident shall happen, expend such further sum, over and above the amount of such insurance, as may be necessary to put the said messuages or tenements and premises respectively in as good plight and condition as the same were previous to the happening of any such accident by fire: and shall, when thereunto required by the said W. W. G., S. A. W., and W. K. G., their heirs or assigns, produce to them every such policy, and the receipt for the premium and duty for the then current year. And there was a proviso for *re-entry by [*372 the last-named parties if the rent should be in arrear twenty-one days next after any day of payment, or if the said William Belton, his executors, &c., should not in all things well and truly perform and keep the covenants and agreements in that instrument before contained according to the true intent and meaning of those presents.

On 14th June, 1845, W. Belton assigned all his interest in the premises to the defendant. An insurance had been effected by W. Belton with the Licensed Victuallers' Insurance Company, on 29th September, 1844, expiring June 7th, 1845. The insurance was on the two messuages respectively in 1000*l.* and 400*l.*, omitting the cottages: and it was in the names of the three first-named trustees, W. W. Gretton, S. A. Wright, and J. Wilson, and also of W. Belton. The defendant caused this policy to be cancelled, and a new one executed, in the names of the trustees mentioned in the lease, and his own name, and comprising the cottages, which were insured at 300*l.* It was dated June 7th, 1845.

The plaintiff, on 26th March, 1846, agreed to purchase of the defend-

ant his interest in the White Swan, &c.; and an agreement between them of that date was executed, by which the defendant undertook to furnish and adduce to the plaintiff a proper title, and well and effectually to assign to him the said lease for the unexpired term therein, which was at least fifty-seven years from Lady-day last, subject to the rent, &c., and to deliver up to the plaintiff quiet possession of the premises, except that part that was underlet, on the 7th day of April then next. The *373] plaintiff paid a deposit, according to the *agreement. But, on inquiry into the title, it was objected by the plaintiff's advisers that a forfeiture had been incurred by neglecting to insure according to the covenant. Another objection was that, although the abstract of title led the vendee to expect the benefit of an underlease of the ten cottages, the vendor could not establish a marketable title to this interest, the underlease having been made before the lease of April, 1845. On these grounds the vendee renounced the purchase and claimed back his deposit; which was refused: and he thereupon brought the present action.

A verdict was found for the plaintiff, but leave reserved to move that a nonsuit or a verdict for the defendant should be entered, if the Court should hold neither objection tenable. *Knowles*, in Hilary term, 1847, obtained a rule nisi accordingly.

Martin and *Vowles* now showed cause. (As to the first objection, the Court intimated an opinion that, whether the underlease were valid or not, the circumstances attending it did not prevent the vendor from giving, and purchaser from acquiring, title to all the subject-matter of assignment as it was described in the agreement of purchase: and this point was not further argued, nor was it noticed in the judgment of the Court. On the motion for a rule, and in argument for the plaintiff, *Gouldsworth v. Knights*, 11 M. & W. 337, *Whitton v. Peacock*, 2 New Ca. 411, *Webb v. Austin*, 7 Man. & G. 701, Co. Litt. 45 a, (a) *374] **Pargeter v. Harris*, 7 Q. B. 708, (b) and Com. Dig. *Estoppel* (E 8), were cited.)

The lease was at all events forfeited for want of proper insurance. The landlord, therefore, had a right of re-entry at his option; *Doe dem. Muston v. Gladwin*, 6 Q. B. 953; (c) and the defendant could make no valid title. From April, when the lease to W. Belton was executed, till June, 1845, the policy was for 1400*l.* only, instead of 1700*l.*, the cottages being uninsured. And, in each of the policies, the tenant's name was inserted as well as those of the trustees; whereas it was never intended by the covenant in the lease that any interest in the policy should vest in the tenant. The addition of his name prejudiced the other

(a) From "Tenant for life" to "so it was adjudged."

(b) See *Doe dem. Lord Downe v. Thompson*, 9 Q. B. 1037.

(c) It was urged in the present case that the landlord's agents had accepted rent after the alleged forfeiture; but the plaintiff's counsel denied that this was proved to have been done with knowledge of the breach of covenant. And they cited note (16) to *Duppa v. Mayo*, 1 Wms. Saund. 288 a, b.

parties: if it had been necessary to sue on the policy, he must have been joined; if they had died, the interest would have survived to him: *Rolls v. Yate*, Yelv. 177, *Wetherell v. Langston*, 1 Exch. 634. (*Knowles*, contra, referred to stat. 14 G. 8, c. 78, s. 88, adopted from stat. 12 G. 8, c. 73, s. 34, and kept in force by stat. 7 & 8 Vict. c. 84, s. 1, and Sched. (A.), as showing that the law would appropriate the insurance money, by whomsoever recovered, to the rebuilding of the premises.) That clause does not affect contracts to insure, between parties interested in the subject of insurance. It contemplates insurances effected to defraud the offices. [Lord DENMAN, C. J. It is not confined to tenants; *for the preamble speaks of "ill-minded persons" generally.] [*375]

Knowles and *Miller*, contra. The question here is not, as in *Doe dem. Mustin v. Gladwin*, 6 Q. B. 958, between the tenant and a landlord who is seeking to take advantage of the forfeiture. Here the forfeiture is merely possible; and the chance is not such as the Court will regard, on a question between vendor and purchaser. As to the amount insured: assuming the lease to have been executed on 15th April, when it bears date, there was then a policy subsisting to the amount of 1400*l.*: it could not be the intention of the parties that a new insurance should be opened for the two months from April to June. It must be understood that the covenant for insurance was to take effect on the commencement of a new period. [COLERIDGE, J. According to you, part of the demised premises were to go uninsured for a time.] The interval was not more than a reasonable one. This point was not insisted upon at the trial; if it had been, the landlord's agent might have been asked more particularly whether the omission was not known by him and the defect waived.^(a) As to the names, the letter of the covenant was complied with by insuring in the joint names of the trustees. The covenant did not require a policy in their names "only." And the clause in the covenant, obliging the lessee to supply what may be wanting for the restoration of the premises if the insurance money should be insufficient, makes it reasonable that he should be a party to the policy. If the trustees were to be *protected, the lessee was not to be debarred from protecting himself. Any suggestion that the lessee might, in consequence, reap a benefit to the disadvantage of the trustees, is answered by the provision of stat. 14 G. 8, c. 78, s. 88, already referred to. *Vernon v. Smith*, 5 B. & Ald. 1, shows that that clause is held to regulate covenants between landlord and tenant, and is not designed merely to prevent fraudulent insurances. [*376]

Lord DENMAN, C. J. I think there is no distinction between the present case and that of an action between landlord and tenant. If a tenant undertakes to sell his term in the premises, and is liable to eviction, he cannot convey. The question therefore is, whether, if the land-

(a) See p. 374, note (b), *ant.*

lord brought ejectment, the lessee or his assignee could say that the terms of the lease had been complied with. In the present case there are two objections which would prevail. First, that the premises have, for a considerable time, not been insured to the requisite amount of 1700*l*. Secondly, that the stipulation to procure a contract with A. is not satisfied by effecting one with A. and B. B. might receive the money and give a release. At all events he is not the party contemplated. I think stat. 14 G. 3, c. 78, s. 83, does not apply. That section proposes, by the preamble, to deter ill-minded persons from setting their houses on fire with a view of gaining to themselves the insurance money; and then it enacts that the directors of the insurance companies may, and are required, "upon the request of any person or persons interested in" "any house," &c., which may be burnt, to cause the insurance money to *377] be laid out in rebuilding. Such a provision (extending the remedy for a particular danger beyond that danger) cannot affect the present covenant. A variation of this kind might expose the lessors to great difficulties. And, at any rate, here is an agreement to make a contract in the name of three, and another is added. That is not a fulfilment.

PATTESON, J. The defendant had not in truth good title to convey, because his landlord might at the time have insisted on a forfeiture for non-insurance. If there was that flaw, he cannot enforce the contract. I see no distinction between this case and that where a landlord is proceeding against the tenant. A party professing to assign a lease means that he will assign a valid one: but it is not so if it might be set aside at any moment. Then the question arises whether there had been such a default that the landlord might have brought ejectment. As to the question on the amount insured, it has been suggested that, if this point had been distinctly raised, the landlord's agent might have been more particularly examined on the trial: but, in fact, the agent appears to have believed, all through, that the insurance was correct. At any rate, it would be useless to send the case to a new trial on this ground if the insurance had never been effected in the right names. Now a covenant to insure in three names means the three and no others, though the word "only" be not inserted. The introduction of another might make it very difficult for the three to enforce the contract, even if it did not enable the fourth to defeat the remedy entirely. I think stat. 14 G. 3, c. 78, s. 83, does not affect this point. It is said that the enacting part *378] goes beyond the preamble, and secures a remedy to the lessors. But there might be great difficulty in obtaining this under a clause which merely enacts that any person interested may call upon the insurance office to apply the money: and it seems to have been the object of the covenant here to provide against that difficulty. The section enacts that the office shall cause the insurance money to "be laid out and expended" in rebuilding, but does not say by whom laid out. The

point has been argued as if the lessee would have to lay out this money; for which reason it is suggested that his name ought to be in the policy: but the covenant is to insure in the name of the lessors, which seems to contemplate that they shall lay the money out. The adding another name imposes so much difficulty on them that I think such an insurance is not a compliance with the lessee's covenant.

COLERIDGE, J. I am of the same opinion. The lessee had not a good interest to convey, if there was a forfeiture which might be enforced. Now, first, the cottages were uninsured from April to June, 1845. It is said that the subsisting policy did not expire till June, and that a double insurance was not to be effected: but, if the lessee had insured only the premises uncovered by the policy, there would have been a good insurance of the whole. The defendant's counsel have to maintain that the parties intended a portion of the premises to be uninsured from April to June. It is urged that a forfeiture cannot have accrued if the insurance, though somewhat delayed, was effected in reasonable time. That might be true, if the omission had been only for a day or two: but it cannot be assumed *as reasonable that a party shall leave premises uninsured for six weeks or two months. There is also a [*379 material defect as to the names. It is said that stat. 14 G. 3, c. 78, s. 83, remedies that. But when parties covenant they do not mean to depend on collateral modes of fulfilling the object. And there might be a specific object here in ordering the insurance so that the money should be payable to the landlords only.

WIGHTMAN, J. I am of the same opinion on both points.

Rule discharged.

The QUEEN v. BELTON. Jan. 15.

Under the Victuallers' Licensing Act, 9 G. 4, c. 61, the sessions hearing an appeal against the refusal of justices to grant a license cannot adjourn such appeal to a subsequent session for the purpose of awarding costs there after a taxation in the interval.

So held on the construction of sects. 27 and 29; but without impeaching the authority of Courts of General or Quarter Sessions to adjourn a case from one session to another when no statute interferes.

MARTIN, in Michaelmas term, 1846, obtained a rule to show cause why the after-mentioned order of the Middlesex Sessions should not be quashed for the insufficiency thereof. The rule was obtained on affidavits which stated the following, among other, facts.

William Belton applied to the justices at an annual licensing meeting for the Tower division of Middlesex, for a license to sell exciseable liquors by retail. The justices, on March 16th, 1846, refused a license. Belton appealed to the Middlesex April sessions; and the appeal there came on for trial on the 20th of that month. Witnesses were examined

for the appellant, and counsel heard on both sides ; and (according to the affidavits of Belton and his attorney) the Assistant Judge then took *380] the votes of the justices, and stated the judgment to be *that the license was refused : and nothing was said of costs ; nor was it said that the hearing and determination of the appeal was or would be adjourned to another session. In the ensuing month of June, Belton was served with the following order (which it was the object of the present motion to quash), and a demand of the costs therein mentioned. The order began :

"Middlesex. At the general session of the peace, holden in and for the county of Middlesex, at the Sessions House on Clerkenwell Green, in and for the said county, on Tuesday the 5th day of May in the ninth year of the reign," &c., "before John Adams, serjeant at law, the Assistant Judge of the said Court of Sessions of the peace, Edward Orme," &c., "and others their fellows, justices of our said Lady the Queen, assigned," &c. : "And which said general session of the peace is from thence continued and holden by adjournment to and at the said Sessions House on Wednesday the 6th day of May in the year aforesaid, before," &c. The order stated several other adjournments, down to May 21st. "And which said general session of the peace is from thence continued and holden by adjournment to and at the said Sessions House on Friday the 22d day of May in the year aforesaid, before the said John Adams, the Assistant Judge," &c., and others, &c. "Whereas William Belton," of, &c., "did, at the General Quarter Session of the peace holden in and for the said county in the month of April last, exhibit his petition and appeal against the refusal of Josiah Wilson," &c., "Esquires, certain of Her Majesty's justices of the peace, acting," &c., "to grant him the said W. Belton a license," &c., "in respect of a house situate," &c. "And whereas the said W. Belton gave to the said Josiah *Wilson," &c., "Esquires, such justices as aforesaid, due notice of *381] his intention to appeal to the General Quarter Session of the peace to be holden in and for the said county of Middlesex on Wednesday the 1st day of April, A. D. 1846, against such their refusal, and also entered into a recognisance with sureties as required by the said act : at which said quarter session the said appeal of the said W. Belton, and the hearing and determination of the matter of such appeal, was then by the Court there adjourned unto this present General Session of the peace in and for the said county of Middlesex holden as aforesaid : Now, upon hearing the said petition and appeal, and what hath been alleged by the said respective parties, their counsel and witnesses, in and concerning the premises, this Court doth dismiss the said petition and appeal, and doth affirm the said judgment and determination of the said Josiah Wilson," &c., "such justices as aforesaid, and doth order and adjudge that the said W. Belton shall pay unto the said Josiah Wilson," &c., "such justices as aforesaid, acting in and for the Tower division aforesaid, or to

whomsoever they may appoint, the sum of 16*l.* 19*s.* 2*d.* by way of costs, that sum being in the opinion of this Court sufficient to indemnify the said Josiah Wilson," &c., "as such justices as aforesaid, from all cost and charge whatsoever to which the said last-mentioned justices may have been put in consequence of their having had served upon them notice of the intention of the said W. Belton to appeal. By the Court. HEATON ELLIS, clerk of the peace."

The appeal was not heard on the said 5th of May, nor at any time except at the sessions held in April mentioned in the above affidavit.

*Belton's attorney deposed that, before the date of the above order, namely on May 16th, he was served with the following [*382 order by a clerk to the respondent justices.

"Middlesex. At the General Quarter Sessions of the peace of our Lady the Queen, holden in and for the county of Middlesex, at the Sessions House for the said county, on Wednesday the 1st day of April in the ninth year of the reign," &c., "and from thence continued by several adjournments to, and holden at, the said Sessions House on Monday the 20th day of April in the said ninth year," &c. "It is ordered that the hearing and determining the matter of an appeal between W. Belton, of," &c., "appellant, and Josiah Wilson," &c., "Esquires, certain of Her Majesty's justices of the peace acting in and for the Tower division," &c., "respondents, touching their refusal to grant a license," &c., "do stand adjourned until the next General Session of the peace to be holden for this county on Tuesday the 5th day of May next; and that, on notice thereof in the mean time," &c., "the said W. Belton and all persons concerned do attend the Court at the Sessions aforesaid on Friday the 22d day of May next, at the hour of ten in the forenoon of the same day, to hear and abide the judgment and determination of the same Court touching the said appeal. By the Court:" &c.

On May 19th, the attorney was served with the bill of the respondents' costs, and notice of taxation, which he did not attend. But he was present at the Sessions House on May 22d, when "the said John Adams, Esq., then acting as the chairman of the said Court of General Sessions, from a paper writing which he had in his hand, mentioned the name of the said appeal, and said that the license was refused with costs, and that the costs had been taxed at the sum of 16*l.* 19*s.* 2*d.*" *The deponent "thereupon stated that he objected to the said Court [*388 of General Sessions making any order in the said appeal." And he afterwards served the justices with notices of motion for a certiorari.

The deputy clerk of the peace, by an affidavit in answer, stated the proceeding on April 20th as follows. "That, after hearing," &c. (counsel and witnesses), "the said Court of Quarter Sessions, so holden by adjournment on the said 20th day of April last as aforesaid, then and there stated, by John Adams, Esquire, serjeant at law, the Assistant Judge of the said Court, that the said appeal would be eventually dismissed."

And "That the said Quarter Sessions then and thereupon, on the said 20th day of April, publicly and in open Court, and before the hearing of the appeal next in order for hearing on the said 20th day of April, ordered the said appeal of the said W. Belton to be adjourned until the next General Sessions of the peace, to commence and be holden in and for the said county on the 5th day of May then next ensuing, in order that this deponent, the said Arthur Grey Maude, as such deputy clerk of the peace as aforesaid, might in the mean time tax the costs of the said justices the respondents in the said appeal, and be prepared at such next General Sessions to report to the Court on the appeal day, which would be on the 22d day of the said month of May, of such General Sessions, his opinion of the amount of costs to be awarded to the said respondents in the event anticipated of a refusal of the said license." The same course was pursued as to several other appeals.

Another deponent stated that the same course was pursued as to several other appeals: and that, on 22d May, a case similarly circum-
 *384] stanced to that of *Belton was called on, and counsel objected that the Court had no power to award costs at this session. The Assistant Judge then said that, in all such cases then standing in the paper, the Court, if so required by the appellant, would receive evidence and hear the case through, and form its judgment on the circumstances then brought before it. None, however, of the appellants whose cases afterwards came on (among whom was Belton) offered evidence, or argued further against the power to award costs.

The chairman's minutes in Belton's case were: on April 20th, "License to be refused. Adjourned till next session." On May 22d, "License refused. 16*l.* 19*s.* 2*d.*"

Pashley now showed cause.(a) On the affidavits as they now stand, the only question is whether the April sessions had power under the Licensing Act, 9 G. 4, c. 61, to adjourn this appeal to the sessions in May.(b) It is evident, from the manner in which "the Court" and "the
 *385] said Court" are spoken of in sect. 29,(c) that *the sessions are deemed a continuing Court for this purpose. This is so, inde-

(a) This case was partly heard, but adjourned, in Michaelmas term (November 13th), 1847. It was now re-argued from the beginning, the court not consisting of the same Judges.

(b) It was agreed that a certiorari lay, sect. 34 not being applicable. And see *Regina v. Dean*, 2 Q. B. 96.

(c) Stat. 9 G. 4, c. 61, "to regulate the granting of licenses to keepers of inns, alehouses, and victualling houses, in England," enacts:

Sect. 27. "That any person who shall think himself aggrieved by any act of any justice, done in and concerning the execution of this act, may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such session shall be holden within twelve days next after such act shall have been done, and in that case to the next subsequent session holden as aforesaid, and not afterwards, provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session, and shall within such five days enter into a recognisance, with two sufficient sureties, before a justice acting in and for such county or

pendently of the statute. The sessions have permanent officers. They may respite a *judgment from session to session without adjourning; *Keen v. The Queen*, 10 Q. B. 928. It seems that a venire [*386 de novo may be directed to them; *Campbell v. The Queen*, post, p. 799. The power of adjourning an appeal is inherent in the sessions, *Rex v. The Justices of Wilts*, 13 East, 352, 353, where it is not expressly taken away by statute. The judgments of the Court in *Rex v. Kimbolton*, 6 A. & E. 603,(a) confirm that rule, though PARTESON, J., questions its application to the particular statute which was before the Court in *Rex v. The Justices of Wilts*: a doubt which does not appear in the report of *Rex v. Kimbolton* in *Neville & Perry*, 1 Nev. & P. 606. The statutory words in *Rex v. The Justices of Wilts* were, that, on appeal to any general quarter sessions, the justices "at the said general quarter sessions" are required to hear and determine; language as strongly in favour of an immediate conclusion as the words "at such session shall hear and determine" in the present act. [COLERIDGE, J. Sect. 27 enacts that the party may appeal to the next general or quarter "*sessions*" (in the plural), unless such "*session*" shall be holden within twelve days, &c., "and in that case to the next subsequent *session* holden as aforesaid:" and recognisance is to be given to appear and try at such "*session*;" and "*the Court*" at such "*session*" is to hear and determine. Lord DENMAN, C. J. And the expression "the said Court" is used three times imme-

place as aforesaid, conditioned to appear at the said session, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded;" "and the court at such session shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said court shall seem meet; and in case the act appealed against shall be the refusal to grant or to transfer any license, and the judgment under which such act was done be reversed, it shall be lawful for the said court to grant or to transfer such license, in the same manner as if such license had been granted at the general annual licensing meeting, or had been transferred at a special session; and the judgment of the said court shall be final and conclusive to all intents and purposes; and in case of dismissal of such appeal, or of the affirmance of the judgment on which such act was done, and which was appealed against, the said court shall adjudge and order the said judgment to be carried into execution, and costs awarded to be paid, and shall if necessary issue process for enforcing such order." Proviso; no justice to act in the hearing of an appeal from anything done by himself under the act: Further proviso, that when the cause of complaint shall have arisen in a liberty, &c., city, or town corporate, the party aggrieved may appeal to the quarter sessions for the county.

Sect. 29 enacts: "That in every case where notice of appeal against the judgment of any justice in or concerning the execution of this act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to be made, and such court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum, by way of costs, as shall in the opinion of such court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal; and if such party shall refuse or neglect forthwith to pay such sum, it shall be lawful for the said court to adjudge and order that the party so refusing or neglecting shall be committed to the common gaol or house of correction, there to remain until such sum be paid."

(a) See *Rex v. Bond*, 6 A. & E. 905, 908, 910.

diately afterwards. COLERIDGE, J. The meaning seems to be that the Court of Quarter Sessions shall decide the case at that session.] At the session then holden, but subject to the power of adjournment. The *387] opposite construction might lead to *great inconvenience, and even encourage fraud. And, if the Bench were equally divided at the particular session, the appeal could not be decided. [Lord DENMAN, C. J. The previous judgment would stand. The question is whether the words of this act are not too strong to be got over.] The practice here adopted at the sessions was probably meant to avoid the inconvenience which was felt after the decision in *Regina v. Long*, 1 Q. B. 740. But, further, the affidavits show that the appellant might, if he had thought proper, have had his witnesses examined, and counsel heard, at the May sessions; and, where a party has the opportunity of going into his case and declines doing so, that is equivalent to a hearing; *Regina v. Church Knowle*, 7 A. & E. 471: it may, therefore, be contended that the appeal here was heard, and the costs were taxed, at the same session.

† *Martin*, *contra*. First, the order shows on the face of it a want of jurisdiction, because the magistrates could not, by the statute, adjourn the hearing and determination of the appeal to another session. Secondly, there was not really an adjournment; and the order ought to be quashed, so that, if it can be done, an order may be returned stating the fact truly. The proposal to hear witnesses and counsel at the May session was merely illusory. As to the first point. The language of sects. 27 and 29 clearly intimates that the whole business is to be done at one session. [Lord DENMAN, C. J. I think we are disposed to say so. But Lord ELLENBOROUGH, in *Rex v. The Justices of Wilts*, 13 East, 352, *388] puts the general power of adjourning very high. The *question is whether this statute supersedes it.] It cannot prevail against the clear meaning of a statute. PATTESON, J., intimates this in *Rex v. Kimbolton*, 6 A. & E. 603. Where the present act intends that the magistrates shall have power to adjourn a case from one session to another, it is expressly enacted; namely in sect. 21, where, in the case of a licensed person charged at sessions with a third offence against the tenor of his license, a proviso is made "that the Court may, upon sufficient cause shown, adjourn the hearing of such charge to the then next general or quarter session of the peace, when the same shall be finally determined." The possibility of the Court being equally divided is not peculiar to quarter sessions. The circumstance happened not long ago in *Wright v. Doe dem. Tatham*, 7 A. & E. 313, in the Exchequer Chamber, and in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703, in this Court. [Lord DENMAN, C. J. The equal declaration of opinion on opposite sides of a case results legally in a judgment that nothing shall be done in that case.] Sect. 29 evidently contemplates a continuous proceeding. If the appellant fails, the sessions are to order that he pay costs to the justices; and he is to be committed if he refuse "forthwith" to

pay. [Lord DENMAN, C. J. And the order is to be by "the Court to whom such appeal shall have been made." WIGHTMAN, J. And he is to pay "such sum, by way of costs, as shall in the opinion of such Court be sufficient." *Martin* was then stopped by the Court.]

LORD DENMAN, C. J. I think the language of this act is clear, and confines the whole proceeding to the *next Court of general or [*389 quarter sessions (not within twelve days) after the cause of complaint shall have arisen. I agree in the opinion expressed by Lord ELLENBOROUGH, in *Rex v. The Justices of Wilts*, 13 East, 852, as to the power inherent in the sessions under ordinary circumstances, though it is true that, in that case, as my brother PATTESON intimated in *Regina v. Kimbolton*, it was not necessary to lay down so-general a proposition. But, giving the fullest effect to the general rule of law, I think the sessions had no power to act upon it under this statute. It has been deemed desirable there that everything should be settled speedily. The language of sects. 21, 27, and 29, shows that intention. It is indeed possible that the Court may be equally divided; but the result then would be that the judgment of the sessions would be the judgment of the justices out of sessions. It is possible, too, that time may be exhausted by keeping back documents or witnesses, or by other means of delay: but it must be supposed that the Court would prevent parties from turning such expedients to advantage. I think that, in the present case, what was done at the first sessions was final, and there was no power to adjourn.

PATTESON, J. The decision of this case turns upon the statute now before us, and must not be considered as interfering with the general authority to adjourn. Whatever that authority may be, here is a statute enacting that appeal shall be made to the next general or quarter sessions, "and the Court at such session" shall hear and determine, and make its order with or *without costs. I do not know that I should lay [*390 much stress on sect. 21. The words there giving power to adjourn may be added *ex majori cautela*; and the omission of such words in another clause would hardly avail to take away the power if it were not done by particular words expressing a limitation. But here the words of sect. 27, and sect. 29 also, have that effect.

COLERIDGE, J. I would not break in upon the general power of quarter sessions, to adjourn cases depending, which is a very useful one. But here a specific limit is given by the language of the act. The words "session" and "sessions" are often used indiscriminately: but here, in sect. 27, an appeal is given to the general or quarter sessions; and then it is said that "the Court at such session" shall hear and determine, and shall make such order, with or without costs, as to "the said Court" shall seem meet. The whole power of the Court arises on this clause, and is tied up by it. As to the assertion that the appellant might have been heard at the May sessions, the cause could not be heard at

one session and then heard at another. It was, in effect, determined in April; and an order, made for a particular purpose, reduced the following session, as regarded this case, to a mere ministerial sitting. Then to offer that the case should be gone through again, when the matter was prejudged and the parties not prepared with witnesses, was to offer nothing. This, however, relates to the last point: the first is sufficient to decide the case.

WIGHTMAN, J. I am of the same opinion, without impugning the *391] general doctrine as to the power of sessions to adjourn. I agree that the proviso in sect. 21, if it stood alone, would not be sufficient to decide this case; but I think it has an important bearing as it shows the general intention of those who framed the act.

Rule absolute.

The QUEEN v. The Inhabitants of HAMMERSMITH. Jan. 15.

An order of removal began: "Whereas complaint hath been made to me, B. C., one of the magistrates of the Police Courts of the Metropolis, sitting at the Clerkenwell Police Court within the Metropolitan police district," &c.: and it ended "Given," &c. "at the Police Court aforesaid, this 29th day," &c. Held, that the order sufficiently appeared to have been made at a Police Court established under stat. 3 & 4 Vict. c. 84, and therefore showed jurisdiction in the magistrate, singly, to make such order, under stat. 2 & 3 Vict. c. 71, s. 14.

By the examinations it appeared that in 1816 the pauper was residing with his father as part of his family in parish H., being then five years old; and that, in 1816, the father acquired a settlement in H.: but it was not expressly stated that, at that time, the pauper was resident with him or unemancipated. The father continued to reside in H. for several years afterwards. Held that, in the absence of contrary proof, the Sessions might properly assume that the pauper continued a member of his father's family and unemancipated, after the settlement was acquired.

ON appeal against the after-mentioned order, for removing Sarah Eaton and her three children from the parish of St. Pancras to the parish of Hammersmith, both in Middlesex, the sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows.

The order of removal began:

"To the churchwardens and overseers of the poor," &c., (of St. Pancras and Hammersmith), "and to each and every of them."

"Metropolitan Police District, to wit. Whereas complaint hath been made unto me, Boyce Combe, Esquire, one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell police court within the metropolitan police district, by the churchwardens and over- *392] seers of the poor of the said parish of St. Pancras, That," &c.

Then followed a recital of complaint, adjudication, and order to remove and to receive, &c. "Given under my hand and seal at the police court aforesaid, this 29th day of September, in the year of our Lord 1845. BOYCE COMBE." (L. s.)

By the examinations it appeared that Sarah the pauper was the widow of John Eaton the younger, who died, 18th August, 1845, aged thirty-four. The settlement in Hammersmith was alleged to have been derived by John Eaton from his father : and the examinations on this point were as follows. Elizabeth Banting, the sister of John Eaton the younger, deposed that "He was the son of John Eaton the elder by Elizabeth his wife, who are both dead. The said John Eaton the elder died in Lawrence Street, Chelsea, seventeen years ago ; and his widow, the said Elizabeth, died there fourteen years ago. They lived together as long as I can remember as husband and wife, and were reputed to be so by all persons who knew them. The said J. Eaton the elder was a plumber and glazier, and resided for many years in the parish of Hammersmith in the county of Middlesex, where he carried on that business. He left Hammersmith nineteen years ago, and went thence next to reside in Lawrence Street, Chelsea, where he occupied apartments in the house of Mrs. Reid, and resided therein until his decease, which happened two years after. My said late brother resided with his parents in the parish of Hammersmith aforesaid as part of their family. He was then under the age of twenty-one years ; and I do not know nor do I believe that he ever did any act to gain a settlement elsewhere. After the decease of my father, which happened in the year 1828, my mother, as the widow of the said J. Eaton *the elder, received relief," &c. (stating relief given to [393 her by the parish of Hammersmith while she resided in the parish of Chelsea). Frederick Clark said : "In the year 1816 I was serving as an apprentice to J. Eaton the elder, a plumber and glazier, then residing at No. 6, Angel Terrace, King Street, in the parish of Hammersmith," &c., "plumber and glazier. I resided there with him for six years or thereabouts, namely, from the year 1816 till the year 1822. In the year 1816 he the said J. Eaton resided for more than forty days, and for several years thence next afterwards, in and upon a tenement of the yearly rent and value of 10*l.* and upwards, consisting of a dwelling-house and premises situate and being the house No. 6 Angel Terrace aforesaid in the said parish of Hammersmith," &c., "of which he was the tenant, and which he held, rented, and occupied of my father, William Clark (since deceased) ; and resided therein for several years thence next after the year 1816. I knew J. Eaton the younger, the son of the above-named J. Eaton, my late master, residing with his father in Hammersmith."

When the appeal came on to be heard, the appellants objected (on grounds of appeal set forth in the case, but on the form of which no question arose) that the order ought to be quashed on each of the three points hereinafter stated. The objections so made were severally overruled, subject to the opinion of the Court of Queen's Bench.

The first objection was, that the order of removal was bad on its face, inasmuch as it failed to show the jurisdiction of Boyce Combe, Esq.,

to make the same. The Clerkenwell Police Court in that order mentioned is not named in any act of parliament as one of the courts or
 *394] *places at which a police magistrate may, when acting alone, exercise the jurisdiction of two justices of the peace in making an order of removal. The statutes 2 & 3 Vict. c. 71, ss. 1, 2, 14, and 3 & 4 Vict. c. 84, ss. 2, 3, 5, were referred to. The second objection was, that the notice of chargeability on its face was bad, purporting to come from the major part of the overseers, whereas the order purported to be made on the complaint of the whole body of churchwardens and overseers. The third objection was, that the examinations failed to show the settlement acquired by the father, J. Eaton the elder, to have been so acquired by him at a time when his son J. Eaton the younger was still living in and a member of his father's family. The notice of chargeability referred to in the second objection was signed by four overseers; and they were a majority of the overseers of the poor of the said parish, including the churchwardens.

If the Court of Queen's Bench should be of opinion that any one or more of the objections ought to have been allowed by the sessions, then the order of removal and order of sessions confirming the same were to be severally quashed; otherwise to be affirmed.

Godson (with whom was *Howorth*), in support of the order of sessions. As to the last objection, the examinations show that the pauper was residing with his father and as a part of his family in 1816, and was then about five years old. It will not be presumed that he became emancipated before the father acquired his settlement in Hammersmith. As to the first point, this Court must take notice that the Clerkenwell Police
 *395] Court is one of those at which a police magistrate *may exercise jurisdiction in making orders of removal. Stat. 3 & 4 Vict. c. 84, s. 2, enacts: "That it shall be lawful for Her Majesty, with the advice of her Privy Council, from time to time to constitute within the Metropolitan Police district so many police court divisions as to Her Majesty shall seem fit, and to define the extent thereof, and from time to time to alter the number and extent of such police court divisions, and to assign a division to each of the police courts already established, and to establish a police court for each of the other divisions." And sect. 5 enacts: "That every order in council, either for constituting or altering a police court division, or for assigning a division to the police courts already established, or for establishing or removing a police court," &c., "shall be published in the London Gazette, and shall take effect from the time appointed for that purpose by the said order." [Lord DENMAN, C. J. Are we bound to infer from the magistrate's order that an order in council establishing this police court was published in the Gazette, though the case does not so state?] That seems to result from the words "shall take effect from the time appointed" "by the said order." [Lord DENMAN, C. J. I dare say there was a regular order a

council: the question is whether we have it before us. COLERIDGE, J. A subsequent question will be, whether, after the police court is established, it be necessary, in every order of the Court, to mention the authority establishing it.] That is the second branch of the argument on this point. (He was then stopped by the Court. (a))

**Pashley*, contra. As to the point last argued. It is essential that the jurisdiction should have been exercised at one of the offices nominated under the police acts: for sect. 14 of stat. 2 & 3 Vict. c. 71, enacts: "That it shall be lawful for any one of the said magistrates appointed or hereafter to be appointed to do alone any act" (as after specified in that clause) "at any of the said courts, or at any place where Her Majesty shall order any such Court to be holden within the limits of the Metropolitan Police district for the time being." Place, therefore, is material. The words "the Clerkenwell Police Court" do not point out a court or place assigned by the Queen in council." "The Clerkenwell Police Court" might be the name of a public-house. Then the question is, simply, whether jurisdiction is to be proved by the mere act of exercising jurisdiction. [COLERIDGE, J. An order by a justice professing to act in and for a county is good on the face of it.] There he avers what is material. [COLERIDGE, J. He does not refer to the commission under which he acts. The argument, that the name of place mentioned in the magistrate's order might be the name of a public-house, would apply if the magistrate had given one of the names expressly recognised by statute.(b)] In *Balman v. Sharp*, 16 M. & W. 93, the writ of summons described the defendant as "now in the castle in the city of York;" and he moved to set aside the process, on an affidavit stating "that the said castle of York, where he, this deponent, was so served with the copy of the writ of summons, is not situate in the city of York:" but the Court held that the affidavit *did not properly negative the existence of a place in the city of York, called The Castle: and it was observed that there might be an inn of that name. [COLERIDGE, J. There the affidavit undertook to contradict the description in the writ, if understood as the plaintiff wished it to be understood; but the Court said that the description might be correct, consistently with the affidavit.] If, in this case, an affidavit were put in denying that the Queen had constituted a Clerkenwell Police Court, it would not necessarily contradict the order. There may have been an old police court of the name: and the powers exercised here are not vested unless the Court has been established within the period referred to by stat. 2 & 3 Vict. c. 71, s. 14. [COLERIDGE, J. Then you say the order must show the date at which the police court was established. WIGHTMAN, J. Stat. 2 & 3 Vict. c. 71, s. 1, enumerates

(a) Lord DENMAN, C. J., intimated, in the beginning of the discussion, that the second point mentioned in the case would not bear argument; and the appellant's counsel gave it up.

(b) See stat. 2 & 3 Vict. c. 71, s. 1.

the police courts then existing, of which it is clear (on comparison of the preamble and enacting part) that this is not one.] Where a special statutory jurisdiction is exercised, everything necessary to the jurisdiction must appear by the order itself; *Regina v. Stockton*, 7 Q. B. 520, *Regina v. Smith*, 7 Q. B. 543. [COLERIDGE, J. In the latter case we refused to make an inference in favour of jurisdiction. No such inference is required here.] If this is a police court established since stat. 2 & 3 Vict. c. 71, it must have been established for a division; otherwise the authority claimed cannot vest: but it does not appear that any Clerkenwell Police Court division has been created. In *Regina v. Lynch*, 7 Irish Equity Reports, 263, on scire facias upon a recognisance, the instrument was set out, beginning: "Whereas, on the 28th day of *398] *April," &c, "at Ballinasloe in the county of Galway, Michael Finegan, of," &c. (naming three persons in all), "came before John Rorke, who then and there was one of the Masters extraordinary of the High Court of Chancery in Ireland, in and for the said county of Galway, and duly authorized in that behalf; and then and there jointly and severally acknowledged," &c. Nul tiel record was pleaded; and, when the recognisance was produced, it appeared that the words "at Ballinasloe, in the county of Galway," were omitted. Sir E. B. SUGDEN, C., held this a fatal variance. [WIGHTMAN, J. The Master named was a master when within the county. It did not appear by the recognisance where the parties appeared before him.] Secondly, the examinations do not show a settlement derivable by the pauper. It appears that the father acquired his settlement at some time in 1816: but it is not shown that the pauper resided with him unemancipated at or after that time, though it appears that he had previously done so. [Lord DENMAN, C. J. The answer to your suggestion is that, in 1816, the pauper was only five years old. COLERIDGE, J. The father appears to have resided continually in Hammersmith till he went to Chelsea. Up to that time the son would continue to have his father's settlement.] Nothing is to be presumed on the subject of emancipation. It may be improbable that the pauper should have been emancipated at five years old: but in *Regina v. The Recorder of Leeds*, 2 Q. B. 547, note (a), this Court refused to assume that a pauper was unmarried and without child or children when hired (the ground of appeal not so stating), though he was only eleven *399] years old at *the time. [WIGHTMAN, J. The question here may be, whether the pauper's age was not some evidence that he was unemancipated; and nothing appears to the contrary.] The same argument applies to *Regina v. The Recorder of Leeds*, 2 Q. B. 547, note (a). The case most resembling the present on this point is *Regina v. Bangor*, *400] 2 New Sess. Ca. 627.(a) *[COLERIDGE, J. Here the son was residing with his father during a certain time before the removal

(a) April 28, 1847.

Examinations showed that the pauper was living in parish L. as a member of his father's family unemancipated, till 1812, when he married. And that, in 1824, the father, then resident in

to Chelsea. He had then the father's settlement. If that settlement of the son is disputed, does not it rest with you to show another?] It appears only, by the examinations, that the pauper resided with his father during a part of his residence in Hammersmith: when, or for how long a time, is not specified. If, consistently with the examinations, a settlement may not have been acquired, the appellants may assume that it was not.

Lord DENMAN, C. J. As to the first point: we know that there are police courts now established in addition to those enumerated in stat. 2 & 3 Vict. c. 71, s. 1; and this, if a police court at all, must be one so established. The fact need not appear expressly on the face of the order. As to the second question: we find the pauper *resident [*401 with his father in 1816, in which year the father's settlement was acquired in Hammersmith. We are not to suppose a new state of things with respect to the pauper; and no length of residence with the father

parish B., received relief from L. Held, that the examinations did not show a derivative settlement of the pauper in L.

The material parts of this case were as follows. On appeal against an order for the removal of Robert Griffith and his wife from the parish of Bangor to the parish of Llandwrog, both in Carnarvonshire, the order was quashed, subject to the opinion of this Court on a case. The case stated the examination of the male pauper, who said: "I am about fifty-three years of age. When I was a child, I lived with my father Griffith Roberts at Llanfachraeth, in the county of Anglesey. I left my father's house when I was about eight years old, and went into service in the parish of Llanfachraeth, but never was in service anywhere under a yearly hiring, or did any act whatever, whereby to gain a settlement in my own right. In or about the month of April 1812, I was married by banns," &c. Catherine Owen deposed that she was married to Griffith Roberts, in or about November 1824, and was his second wife; and that he had then five children living, one of whom was the pauper. "After our marriage we lived at Bodedern" (in the county of Anglesey), "and my said husband died in the parish of Bodedern about five years and a half after our marriage. Soon after we were married, my said husband, being lame," &c., applied to the overseers of the parish of Llandwrog, in the county of Carnarvon, in which parish his settlement was, for relief, which was granted him; and he continued to receive it till his death." During the whole time of receiving such relief, he was resident in Bodedern. "My said husband G. Roberts never to my knowledge and belief gained a settlement in his own right. His son, the examinant Robert Griffith, was always considered a legitimate child." It was stated, as a ground of appeal, that it appears on the face of the examination of Robert Griffith that he was married, and accordingly emancipated, before the relief mentioned in Catherine Owen's examination was given to his father. And, as a further ground, that the examinations contained no sufficient legal evidence that the paupers were settled in Llandwrog. The objection to the examinations was urged on the hearing of an appeal, but overruled; and the respondents then proved that the pauper's father had resided out of the parish of Llandwrog for many years before the pauper's marriage, and ever afterwards. The sessions quashed the order of removal, subject to the opinion of this Court on a case. The questions submitted were: Whether the examinations were sufficient to support the order of removal: And, if they were, whether, under the circumstances, the pauper was entitled to a derivative settlement in Llandwrog, as derived from his father. If the court should hold the examinations insufficient, or the pauper not entitled to the settlement, the order of sessions was to be confirmed; otherwise to be quashed.

Townsend, in support of the order of sessions, insisted that the examinations made out no case, because, consistently with them, the father's settlement in Llandwrog might have been obtained long after the son's emancipation. *Regina v. Lilleshall*, 7 Q. B. 158, turned, not on the time of emancipation relatively to the date of the facts showing settlement, but on the question whether an emancipation was shown at all. *W. Yardley*, contra, observed that the sessions appeared to have thought the examinations sufficient: and he relied upon *Regina v. Lilleshall*, 7 Q. B. 158, and *Regina v. Brighthelmston*, 7 Q. B. 549.

The Court (Lord DENMAN, C. J., PATTESON, WIGHTMAN, and ERLE, J.) held the examinations scarcely insufficient. Order of sessions confirmed.

is necessary to the respondents' case, not even forty days : it was enough if he resided at all so as to take the settlement of his father.

PATTERSON, J. The Clerkenwell court was not a police court at all if it was not established under stat. 3 & 4 Vict. c. 84: and we must take it to have been so, subject to correction by evidence if the truth were otherwise. On the other point, it is suggested that, before the father's settlement was gained, the son may have become emancipated, though he was only five years old at the time. But the sense of the examinations is clear. The child was residing with the father as part of his family. To suggest that he had become emancipated at a particular time, is calling on us to presume a fact which ought to be proved: for the general assumption, as laid down by ABBOTT, C. J., in *Rex v. Hardwick*, 5 B. & Ald. 176, is, that, "during the minority of the child, he will remain almost under any circumstances unemancipated."

COLERIDGE, J. I am of the same opinion. As if to exclude the possibility of "The Clerkenwell Police Court" being a public-house, the order ends "Given," &c., "at the police court aforesaid:" that must signify a police court; and, if so, it must be the court previously mentioned in the order. It appears to be suggested that some time ought to be shown *402] during which the son *lived unemancipated with his father after the father acquired his settlement; but there is no authority for this: it is enough if he resided a day.

WIGHTMAN, J. There is no doubt on the first point. The magistrate is sitting at a court which he calls the Clerkenwell Police Court. The only question is whether, on a view of the two acts, 2 & 3 Vict. c. 71, and 3 & 4 Vict. c. 84, we can say that this must be one of those constituted under the latter act. Now stat. 2 & 3 Vict. c. 71, enumerates the then existing courts, and this is not one of them. To be a police court at all, it must have been constituted under the subsequent act. On the other point I agree with the rest of the Court.

Order of sessions confirmed.

DOE, on the demise of BUDDLE, v. LINES. Jan. 18.

Tenant for a term underleased. The sub-lessee held over, and paid rent. The original lease commenced at Christmas and expired at Midsummer. Held that the tenancy from year to year commenced at Midsummer, not Christmas, and notice to quit must be given accordingly.

EJECTMENT for premises in Middlesex. There was a single demise by William Buddle, laid on 26th June, 1847.

On the trial before COLERIDGE, J., at the sittings in Middlesex during the present term, it appeared that The Grand Junction Canal Company leased the premises, for twenty-one years and three quarters, from 24th December, 1825, to James Southgate Stevens. He assigned the lease to John Taft on 29th September, 1831. In 1832, Taft underleased to

Messrs. Pitcher & Carter a moiety of the premises at 60*l.* a year, payable quarterly, the holding to commence from December 25th, 1881, for fourteen years and a half then to come *and unexpired. His interest subsequently came to the lessor of the plaintiff, and that [*403 of Pitcher & Carter to the defendant. Their term, and consequently the defendant's, expired on 24th June, 1846. The defendant held over and paid rent. Taft had had another lease granted to him by The Grand Junction Canal Company; which lease was also assigned to the lessor of the plaintiff. On Christmas-day, 1846, a notice to quit, for the 24th June, 1847, was served upon the defendant. On this state of facts the learned Judge directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendant if the Court should be of opinion that the notice ought to have been to quit at Christmas, 1847.

Keating now moved accordingly. (a) The question is, when the tenancy from year to year was to be determined. When a tenant, whose term ends in the broken part of a year, holds over and pays rent, does his new tenancy expire with reference to his original entry, or at the broken part of the year? It determines with reference to the original entry: and, therefore, in this case the notice to quit ought to have been for Christmas, 1847. Doe dem. *Robinson v. Dobell*, 1 Q. B. 806, was a case of a tenant overholding after the expiration of a valid lease; and in that case the current year was held to refer to the original entry: but a tenant entering under a lease only professing to create a tenancy, if he pays rent, becomes a tenant from year to year upon the terms of the lease. There is a stronger analogy *still to another class of [*404 cases. Where tenant for life makes lease for years and dies in the middle of the year, and the remainder-man accepts rent, there a tenancy from year to year is created; and such tenancy is determinable, and notice to quit must be given, with reference to the original entry. [PATTERSON, J. In Doe dem. *Robinson v. Dobell*, the notice to quit was expressly mentioned in the original terms of the lease.] In the present case, as soon as the holding over commenced, all the terms of the old lease would be imported into the tenancy; Doe dem. *Collins v. Weller*, 7 T. R. 478. But the instance of the remainder-man is very strong, because he does not claim under the tenant for life, and, therefore, there is no privity between him and the lessee. The remainder-man has no power of contracting with tenants; and yet the tenancy which has arisen from his receipt of rent has reference to the original entry; Roe dem. *Jordan v. Ward*, 1 H. Bl. 97. This case supports the general principle that a tenancy from year to year must be taken to refer to the original entry when it is established merely by payment of rent. [PATTERSON, J. If you suppose a lease to expire on a quarter day, and rent to be then received, that would explain a great many of the cases.] COLTMAN, J.,

(a) Before Lord DENMAN, C. J., PATTERSON and COLERIDGE, Js. WIGHTMAN, J., was absent on account of ill health.

says, in *Berry v. Lindley*, 3 M. & G. 498, 512: "A party who enters under an agreement void by the statute of frauds, becomes by that statute tenant at will to the owner, and the tenancy described in the statute as a tenancy at will has since been construed to enure as a tenancy from year to year. But such tenant may quit without notice, and be ejected without notice, at the expiration of the period contemplated in the *405] *agreement; Doe dem. *Tilt v. Stratton*, 4 Bingh. 446. If, subsequently to that period, the tenant goes on paying the rent, I think he must be considered as tenant with reference to the period of the original entry, unless something appears which shows that a different arrangement was come to." [Lord DENMAN, C. J. The case itself is hardly in point.] In that case it was agreed from the first that the term should end at a broken part of the year; it was a lease for five years and a half; it might have seemed, therefore, as if the lease tenancy was to be reckoned from that point; yet it was held otherwise. [COLERIDGE, J. According to you, if a man holds over for a single day, he is in for a year and a half.] That is so if rent has been received subsequently. [COLERIDGE, J. Is there any case where the original term expired by the death of tenant for life in the middle of a quarter?] The cases support Doe dem. *Robinson v. Dobell*, 1 Q. B. 806, and *Berry v. Lindley*, 3 M. & G. 498: and it is convenient that there should not be a broken portion of the year. These tenancies are for the benefit of occupants; and it is most desirable that they should be able to adapt their husbandry to holdings regulated by their original entry.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

We are of opinion that the tenancy from year to year commenced at the expiration of the previous lease. This is not at variance with any of the cases. The original entry spoken of in them is the original entry *406] of *the lessee himself. That is not so here; and there is no foundation for the argument which has been advanced.

Rule refused.

TOLHURST v. NOTLEY: Jan. 18.

In assumpsit on a promissory note, by endorsee against maker, defendant pleaded that the payee before, at, and ever since the time of endorsement, was indebted to him in a sum equalling the money due on the note, and damages; and, while so indebted, and after maturity, in order to deprive defendant of his set-off, in fraud of defendant and in collusion with plaintiff, endorsed to plaintiff without consideration, in order to enable him to sue for the use and benefit of the payee: and that plaintiff commenced and maintains the action as agent for the payee, for his use and benefit, according to the fraud and collusion. And defendant offered to set off, to the payee and plaintiff, the damages sustained by the non-payment of the note, against the payee's debt to defendant. Replication: *De injuriâ*.

Special demurrer to the replication held frivolous, inasmuch as fraud was averred in the plea; and it was immaterial to the goodness of the replication whether, without such averment, the plea disclosed a defence.

DECLARATION in assumpsit against the maker of a promissory note made payable to one Webb, and by him endorsed to the plaintiff.

The defendant pleaded that Webb, before and at and ever since the time of endorsement, was indebted to him for work and labour, &c., in a sum equalling the money due on the note, and damages; and that Webb, while so indebted and after the maturity of the bill, in order to deprive defendant of his set-off, did, in fraud of the defendant, and in collusion with the plaintiff, endorse the note to the plaintiff without consideration, in order to enable him to sue for the use and benefit of Webb; and that the plaintiff commenced and maintains the action as agent for Webb, for his use and benefit, according to the said fraud and collusion. And defendant offered to set off to Webb and the plaintiff the damages sustained by the non-payment of the note, against the debt of Webb to the defendant. Verification.

Replication: De injuriâ.

*Special demurrer, on the ground that this form of replication was inadmissible. [*407]

On summons, ERLE, J., at chambers, struck out the demurrer as frivolous.

Barstow now moved for a rule to rescind the order of the learned Judge. This plea, according to the rule in *Salter v. Purchell*, 1 Q. B. 209, 219,(a) does not admit of a replication De injuriâ, being "in substance a plea of set-off." Here, as there, the defence rests upon the fact that the plaintiff is agent of a party against whom the defendant has a set-off. [ERLE, J. The plea sets up fraud and collusion between the plaintiff and Webb; the replication therefore is good according to *Bennett v. Bull*, 1 Exch. 593,(b) where *Parker v. Riley*, 3 M. & W. 230, is referred to.] The fraud here is immaterial to the defence; the plea shows a good answer without that allegation. If issue were joined on this replication, and the case went to trial, the Judge would withdraw the consideration of fraud from the jury: if he did not, and they negatived the fraud, but affirmed the other averments of the plea, the defendant would have the postea.

Lord DENMAN, C. J. The defendant is entitled to prove the truth of his plea by joining issue on this replication. The rule is, that, wherever fraud is of the essence of the defence, De injuriâ may be replied. Now here, if the fraud be not of the essence of the defence (and whether it be so or not I do not say), the *defendant has so pleaded as to induce the plaintiff to suppose that the fraud is relied upon. I therefore think the case is not taken out of the rule. [*408]

PATTESON, J. The defendant has averred fraud. Whether or not the plea would have been good without that averment, does not signify.

(a) In Exch. Ch., overruling the judgment of Q. B., in *Purchell v. Salter*, 1 Q. B. 197.

(b) See *Robinson v. Little*, 9 Q. B. 602.

ERLE, J.(a) The replication *De injuriâ* always enables a defendant who has a real defence to establish it. Whenever I see a special demurrer to that replication, I suspect that the defendant means to evade the merits. Now, in any case where there has been a solemn decision, a demurrer in defiance of that is frivolous: and we have a solemn decision that *De injuriâ* is a proper reply where fraud is set up; and fraud is set up by this plea: the case, therefore, is within the authority of *Bennett v. Bull*; for which reason I thought myself justified in setting the demurrer aside. The defendant, if he has the merits, may prove them: there will be time enough to decide whether the plea be sufficient without the averment of fraud. It is enough now to say that, when there is such an averment, *De injuriâ* may be replied. Rule refused.

(a) COLERIDGE, J., was in the Bail Court; WIGHTMAN, J., was absent, on account of indisposition.

*409] *DOE, on the demise of ELIZABETH CRAWLEY, v. MARY GUTTERIDGE. Jan. 20.

A., being tenant in fee of land, mortgaged for a term to secure 150*l.*, and afterwards died, having devised the land to B. for life, remainder to C. in fee. Afterwards, B. and C. borrowed from Z. 165*l.*, to pay off the principal and interest, and also 185*l.* more; and the mortgage, by assignment, to which B. and C. were parties, assigned the term to Z., as a security for the whole 350*l.*: and B. and C. covenanted for the payment of the whole 350*l.*

Held that the deed required, besides an *ad valorem* stamp on the 185*l.*, a stamp in respect of the covenant of B. and C., since they became, by the deed, absolutely liable to the payment of the 165*l.*, which otherwise they would not have been without assets; and the covenant, as to such liability, could not be considered as merely incident to the assignment in respect of the old loan or the new security for the new loan.

EJECTMENT for messuages, buildings, and land, in Bedfordshire; demise, 8th March, 1845.

On the trial, before POLLOCK, C. B., at the Bedfordshire Spring assizes, 1847, it appeared that the plaintiff claimed under a deed of 7th September, 1844, between Edwin Latham Brickwood of the first part, Mary Gutteridge (the defendant) of the second part, Joseph Gutteridge of the third part, and Elizabeth Crawley (lessor of plaintiff) of the fourth part.

The deed recited certain conveyances, by which the land in question was conveyed to Joseph Gutteridge, deceased, father to Joseph the party to the deed of 1844, in fee. It then recited an indenture of mortgage of 25th September, 1838, between Joseph Gutteridge, the father, of the one part, and E. L. Brickwood, of the other part: whereby the said Joseph G., the father, in consideration of 150*l.* lent to him by Brickwood, did demise, &c., to Brickwood, his executors, &c., the land in question, habendum to him and them for 1000 years from the day before the date of the indenture, subject to a proviso for ceaser of the term on payment to Brickwood of the 150*l.* and interest, "at the rate, time, and in man-

ner in the said indenture also mentioned." The indenture of 1844 further recited that Joseph G., the father, *devised to his wife, the [410 defendant, for her life, with remainder, as to a part (being the property now in question), to his son, Joseph Gutteridge, in fee: and that he died without revoking his will. That there was now owing to Brickwood the sum of 165*l*., for principal and interest: and that the defendant and Joseph Gutteridge, the son, had requested the lessor of the plaintiff to advance them 350*l*., "to enable them to pay off and discharge the said sum of 165*l*., and for their other occasions; which she has agreed to do, upon having the repayment thereof, with interest, secured to her in manner hereinafter mentioned."

The indenture then witnessed that, in consideration of 165*l*., paid by the lessor of the plaintiff to Brickwood, at the request and by the direction and appointment of the defendant and Joseph Gutteridge, the son, testified by their being parties, and executing the deed (the receipt whereof Brickwood acknowledged), and also in consideration of the further sum of 185*l*., at the same time paid by the lessor of the plaintiff to the defendant and Joseph Gutteridge, the son, making together 350*l*. (the receipt whereof the defendant and Joseph Gutteridge, the son, acknowledged), "He the said E. L. Brickwood, at the request and by the direction of the said Mary Gutteridge and Joseph Gutteridge, party hereto, testified as aforesaid, hath bargained, sold, assigned, transferred, and set over, and, by these presents, doth bargain, sell, assign, transfer, and set over, unto the said Elizabeth Crawley, her executors, administrators, and assigns," the property in question. "And the said Mary Gutteridge and Joseph Gutteridge have, and each of them hath, bargained, sold, assigned, and confirmed, and by these presents do, and each of *them doth, [411 bargain, sell, assign, and confirm, unto the said Elizabeth Crawley, her executors, administrators, and assigns, all" the property in question, "mentioned in, and demised to the said E. L. Brickwood by, the before recited indenture of the 25th day of September, 1888, from henceforth, for and during all the residue and remainder of the said term of 1000 years therein yet to come and unexpired, in as full, large, ample, and beneficial manner, to all intents and purposes, and as effectually, as the said E. L. Brickwood might or could have held and enjoyed the same premises in case these presents had not been made. But subject to the proviso, hereinafter contained, for redemption of the said premises. Provided always, and these presents are upon this express condition, that, if the said Mary Gutteridge and Joseph Gutteridge, their or either of their heirs, executors, or administrators, shall pay unto the said Elizabeth Crawley, her executors, administrators, or assigns, at her dwelling-house, situate," &c., "the full sum of 350*l* with interest," &c. (at 5 per cent.), "upon the 7th day of March next, without any abatement whatsoever, then these presents, and the residue of the said term of 1000 years, shall cease and be void to all intents and purposes whatsoever. And the said

Mary Gutteridge and Joseph Gutteridge do, and each of them doth, hereby, severally for themselves, their heirs, executors, and administrators, covenant, promise, and agree to and with the said Elizabeth Crawley, her executors, administrators, and assigns, that they, the said Mary G. and Joseph G., their heirs, executors," &c., "shall well and truly pay or cause to be paid unto the said Elizabeth Crawley, her executors," &c., *412] "the said principal sum *of 350*l.* and interest, at the time and in manner hereinbefore appointed for payment thereof, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents." And also that they, the said Mary G. and Joseph G., now have, and each of them hath, in herself and himself, good right to bargain, sell, ratify, and confirm the said hereditaments and premises unto the said Elizabeth Crawley, her executors," &c., "for all the residue of the said term," &c., "in manner aforesaid, according to the true intent and meaning of these presents. And, further, that it shall and may be lawful to and for the said Elizabeth Crawley, her executors," &c., "after default shall be made in payment of the said sum of 350*l.* and interest contrary to the proviso hereinbefore contained, peaceably to enter upon the said hereditaments, and to hold," &c., "without any interruption," &c., "of, from, or by the said Mary G. and Joseph G., or either of them, or any other person whatsoever; and that free and clear of and from all estates, titles, troubles, liens, charges, and encumbrances whatsoever." Then followed a covenant for further assurance to be made by Mary Gutteridge and Joseph Gutteridge. "Provided lastly, and it is hereby declared and agreed, that, until (a) default shall happen to be made in payment of the said sum of 350*l.* and interest, contrary to the proviso hereinbefore contained, it shall be lawful for the said Elizabeth Crawley, (a) her executors, administrators, or assigns, to occupy and enjoy, and to receive and take the rents and profits of, the said hereditaments hereby conveyed and assigned, without any interruption *413] whatsoever of, from, or by the said Mary G. and Joseph G. *their or either of their heirs, executors, administrators, or assigns, or any person claiming under them or either of them."

The deed was written on two skins: on the first of which was a stamp of 4*l.*, and on the second a stamp of 1*l.*: but it contained more than three times 1080 words. It was contended, for the defendants, that another follower of 1*l.* was necessary, and that for want of this the deed could not be read. The Lord Chief Baron reserved leave to move for a nonsuit: and the deed was read; and a verdict found for the plaintiff.

In Easter term, 1847, *O'Malley* obtained a rule nisi for a nonsuit.

Byles, Serjt., and *Prendergast*, now showed cause. The question is, whether enough has been paid in all: if so, the distribution of the amount is immaterial, by sect. 10 of stat. 55 G. 3, c. 184. Now, by the schedule, Part I. title *Mortgage*, the stamp on an assignment of mortgage,

where a fresh sum is advanced, would be the same as on an original mortgage for the whole, that is, here, 350*l.*, for which the ad valorem stamp would be 4*l.*; and the progressive duty here would require 2*l.*: so that enough has not been paid, according to that statute. But then stat. 3 G. 4, c. 117, s. 2, enacts that, upon any transfer, assignment, &c., of a mortgage, "if any further sum of money or stock shall be added to the principal money or stock already secured, the ad valorem duty on mortgages, payable under the said recited acts" (55 G. 3, c. 184, and the Irish Stamp Act, 56 G. 3, c. 56), "respectively, shall be charged only in respect of such further money or stock." Here the further money is 185*l.*, which would require only 2*l.*; and that, with the *progressive [414
sive duty of 2*l.*, would make up only 4*l.*, whereas 5*l.* has been paid. [WIGHTMAN, J. Sect. 3 in that statute, according to a case in 2 Moore & Payne, (a) applies only where no fresh party is introduced.] The question here will be on sect 2. In Doe dem. Bartley v. Gray, 3 A. & E. 89, it was held that, though a transfer of a mortgage term was accompanied by a release of the fee, still no ad valorem duty was payable except on the additional sum secured, and that the progressive duty was 1*l.* only, and not 1*l.* 5*s.*, the progressive duty named in stat. 3 G. 4, c. 117, s. 2, for the case where no additional sum is secured. There, indeed, the Court left undecided the question whether 1*l.* 15*s.* were required for a deed stamp. But in Doe dem. Barnes v. Rowe, 4 New Ca. 737, it was decided that, on a transfer of a mortgage with an additional loan secured, no deed stamp was requisite. In Doe dem. Snell v. Tom, 4 Q. B. 615, a deed professed to transfer a mortgage with an additional sum to be secured; but the original mortgagee did not join: and this was held to require an ad valorem stamp on the new loan only: and afterwards, when the original mortgagee executed a distinct deed of transfer, this was held to require only a transfer deed stamp of 1*l.* 15*s.* In Doe dem. Bowman v. Lewis, 13 M. & W. 241, it was held that the assignment did not require the 1*l.* 15*s.* stamp, where there was a fresh sum advanced and an ad valorem duty paid on the whole sum secured. These cases appear to be scarcely reconcilable with other authorities which will be cited in support of the rule: the latter, however, are not inconsistent *with the case of the present plaintiff. Lant v. Peace, 8 A. & [415
E. 248, is one of these latter. There the mortgagor borrowed additional money and also mortgaged additional land for the whole sum; and it was held that a duty of 1*l.* 15*s.*, as upon a deed not otherwise charged for, was required in respect of the security which was given for the original loan on the new land. In Brown v. Pegg, 6 Q. B. 1, a debtor, who had mortgaged for a term, borrowed a sum with part of which he paid off the old mortgage; and he mortgaged in fee to the new lender; and, by the same deed, the first mortgagee also assigned the term to the new lender: and this was held to require, besides the ad

(*) Apparently, Martin, demandant, 2 M. & P. 240. S. C. (Martin's Case) 5 Bing. 160.

valorem stamp, a deed stamp in respect of the conveyance of the fee. That was not the case of a transfer, properly speaking. *Humberston v. Jones*, 16 M. & W. 763, was a transaction of the same kind. In the last case, stress was laid on the fact that the deed contained a new covenant to pay, and at different times from those named in the original mortgage: but that is no more than must occur in every transfer where a fresh sum is advanced; for there is always a covenant to pay the whole, and the covenant must be new as to the additional sum. There, also, the deed had a new power of sale. But, further, in both these cases, no notice seems to have been taken of a clause in Schedule, Part 1, to stat. 55 G. 3, c. 184, title *Mortgage*, which directs that "in all other cases where a mortgage or other instrument hereby charged with the ad valorem duty on mortgages shall be contained in one and the same deed or writing with any other matter or thing (*except what shall be incident to* *416] *such mortgage or other instrument*), such deed or writing shall be charged with the same duties (except the progressive duty), as such mortgage or other instrument and such other matter or thing would have been separately charged with if contained in separate deeds or writings." Now, in these cases, the covenant for the payment of money is clearly incident to the mortgage. Assuming that a conveyance of the fee would make a deed stamp necessary, here no such conveyance is made: the parties entitled to the fee, subject to the mortgage terms, merely confirm the transfer of the mortgage; the confirmation was unnecessary, and passes no interest. If there be any ambiguity, the construction imposing the duty will be least favoured; *Warrington v. Furber*, 8 East, 242, 245, *Tomkins v. Ashby*, 6 B. & C. 541, 542.

O'Malley and Peacock, *contra*. (a) The facts bring the case within the principle of *Brown v. Pegg*, 6 Q. B. 1, and *Humberston v. Jones*, 16 M. & W. 763. The deed in question is more than a transfer with an additional advance. The term for payment is varied; and new parties are introduced, who are entitled to the fee subject to the mortgage. It is as if the term were called in and a new mortgage granted for the whole: in that case an ad valorem stamp of 4*l.* with the 2*l.* for progressive duty would be required. [PATTESON, J. On the face of the deed there is no conveyance of either a new term or the fee.] There is a confirmation. [PATTESON, J. That was not necessary to give effect to the transfer: the *417] original mortgagee could transfer by himself.] At any rate *there is a further security: and there are authorities to show that, where that is given, a stamp is wanted, besides the ad valorem stamp on the fresh advance: and no decision contradicts this. In *Doe dem. Bartley v. Gray*, 3 A. & E. 89, the Court expressly left it undecided whether a deed stamp was necessary to a transfer, besides the ad valorem stamp on the new loan; though, in the judgment in *Doe dem. Barnes v. Rowe*, 4 New Ca. 737, this decision is inaccurately supposed to have been

(a) The argument in support of the rule was heard on 21st January.

against the necessity of a deed stamp. But the case itself of *Doe dem. Barnes v. Rowe* decides nothing against the necessity of a deed stamp here: in that case no new security was given. [PATTERSON, J. In fact, that case is against you unless you show that the deed here contained a fresh security.] If that can be shown, *Lant v. Peape*, 8 A. & E. 248, and *Brown v. Pegg*, are decisive in favour of this rule. And the application of those cases made in *Humberston v. Jones* is conclusive here: for there the new security was only that there were covenants to pay the old debt as well as the new, and a power of sale; and here the covenants are for the whole sum. [PATTERSON, J. The covenants to pay the new loan may be considered as merely incident to the new loan; as to the covenant to pay the original loan, the covenantors would be liable, without express covenant, as representing the devisor, the original mortgagor.] For the original loan, they would be liable only to the extent of the assets: they make themselves liable absolutely. There could be no doubt of this, if there were a fresh mortgage for the new loan only, and in such mortgage the mortgagors *covenanted also to pay the old loan. In *Humberston v. Jones*, 16 [418 M. & W. 763, the power of sale gave no legal right which the mortgagee in fee would not have had without such power. A passage in 5 Jarman on Conveyancing, 541, 3d (Sweet's) edition, is cited in *Brown v. Pegg*, 6 Q. B. 9, in which it is taken for granted that a covenant to pay the entire debt would make an additional stamp necessary on the transfer. Indeed, on the words of stat. 3 G. 4, c. 117, s. 2, it is not easy to see how, even without a fresh security, a stamp of 1*l.* 15*s.*, in addition to the ad valorem on the advance, can be dispensed with: for the stamp of 1*l.* 15*s.* is imposed, in direct terms, upon any transfer of a mortgage; and then the ad valorem duty on the new advance seems to be imposed besides. The intention of the legislature seems to have been to lay the 1*l.* 15*s.* on all that can properly be called the transfer, that is, on the assignment of the security for the original loan; and to treat the deed, so far as relates to the new loan, as a mortgage for so much: thus the same effect would be given, as if there were two deeds, one transferring the old security simply, the other creating a fresh mortgage for the new loan. Otherwise, by merely introducing a new loan of one shilling, which would require only a duty of 1*l.*, the duty on the transfer itself, of 1*l.* 15*s.*, might be always evaded. *Doe dem. Barnes v. Rowe*, 4 New Ca. 737, is indeed an authority against this argument: but, if it be necessary, that decision should be reconsidered: it clearly proceeded on a misconception of *Doe dem. Bartley v. Gray*, 3 A. & E. 89.

*Lord DENMAN, C. J. It appears to me that this deed was [419 liable to the additional stamp. The case is as if a new party had covenanted for himself, his heirs and executors; and such an instrument would of course require a stamp.

PATTERSON, J. That certainly is so. The tenant for life would not be

personally bound by the original loan : this deed therefore so far creates a new liability in her. I need not go into the other points which have been raised. I must, however, say that my brother *Byles* admitted more than was necessary when he said that the cases upon which he relied were not reconcilable with other cases. I think, when we read all the cases carefully, it is not difficult to reconcile them : except that, in *Doe dem. Barnes v. Rowe*, the Court of Common Pleas does seem a little to have misunderstood *Doe dem. Bartley v. Gray*. We may, however, take *Doe dem. Barnes v. Rowe*, as an original decision that no deed stamp was necessary in the case then before the Court. The decision in *Doe dem. Bartley v. Gray*, was that the ad valorem stamp was requisite only to the amount of the new loan ; though it was also disputed whether or not the transfer in itself required a deed stamp likewise, a point not there decided. There is this difference, under stat. 3 G. 4, c. 117, s. 2, between the transfer duty and the ad valorem duty, that the progressive duty on the transfer is 1*l.* 5*s.* while it is only 1*l.* on the ad valorem duty upon an original mortgage. Accordingly, in *Doe dem. Bartley v. Gray* *420] it became *necessary to decide whether the progressive duty should be estimated as upon a transfer or as upon the ad valorem on the new loan. But whether a 1*l.* 15*s.* stamp was wanted, it was unnecessary to determine, because in fact the deed had such a stamp. This the Court of Common Pleas did not advert to ; and we must therefore treat their decision in *Doe dem. Barnes v. Rowe* as an original one. Here, however, we have not to inquire whether their decision was right, inasmuch as the present case is clearly within the principle of *Brown v. Pegg*, 6 Q. B. 1, and *Humberston v. Jones*, 16 M. & W. 763.

COLERIDGE, J. It clearly is so : and I agree in those decisions.

WIGHTMAN, J. It is not necessary for us to decide whether there ought, as Mr. *Peacock* contends, to be a deed stamp on every transfer, where a new loan is introduced and an ad valorem stamp is put on the deed in respect of such new loan. For here is a new security for the old loan, as well as the new, given absolutely by parties who otherwise, so far as the old loan is concerned, would be liable only to the extent of assets.

Byles, Serjt., then prayed that there might be a new trial on payment of costs, as was allowed in *Humberston v. Jones*.

LORD DENMAN, C. J. That seems reasonable. Rule accordingly.

*421] *JACOBS v. TARLETON. Jan. 31.

Where plaintiff, who sued as endorsee of a bill of exchange, relied, in the first instance, upon a *prima facie* case by evidence of the endorser's handwriting, evidence was given for the defence (on a plea traversing the endorsement) to show that plaintiff was too poor to have given value for the bill, and had disclaimed all knowledge of it : Held, that plaintiff could not give evidence in reply that he was able to give value, and had actually discounted the bill, because such evidence was not in contradiction, but merely confirmatory of his *prima facie* case.

ASSUMPSIT by endorsee of a bill of exchange against the acceptor. The third plea traversed the endorsement to the plaintiff. Issue thereon.

On the trial, before PARKE, B., at the Summer assizes for the county of Surrey, 1847, the plaintiff, in support of his case on the above issue, relied upon the mere proof of the handwriting of the alleged endorsement. For the defendant evidence was given to show that the plaintiff was too poor to have given value for the bill, and that he had denied all knowledge of it, and had also denied having authorized any one to bring the action. It was then proposed to give evidence for the plaintiff, in reply, to show that he had the means of discounting the bill, and had in fact discounted it. The learned Judge rejected this evidence, on the ground that the plaintiff was bound to go into his whole case in the first instance. A verdict having been given for the defendant on this issue,

Chambers, in Michaelmas term last, obtained a rule nisi for a new trial, on the ground that the evidence in reply had been improperly rejected.

Sir F. Thesiger, *Shee*, Serjt., and *Ogle*, on a former day in this term, showed cause,^(a) and contended that it was not competent to the plaintiff to rely upon a *prima facie* case in the first instance, and then [*422 to support it by further evidence in reply. *Rees v. Smith*, 2 Stark. N. P. C. 31, *Browne v. Murray*, Ry. & M. 254, and *Marston v. Allen*, 8 M. & W. 494, were cited.

Chambers and *Petersdorff*, *contrâ*. Proof of the endorsee's handwriting is the only evidence usually given to prove his endorsement: and any change of practice would lead to great inconvenience; for it will become necessary in every case to go into the merits of the endorsement in the first instance for the purpose of anticipating every sort of defence. In *Hayes v. Caulfield*, 5 Q. B. 81, it was taken that the only possible meaning of the plea "did not endorse," in that case, was to call in question the handwriting of the endorsee; and in most cases it certainly is the only meaning which such a plea is intended to convey. *Rees v. Smith* is commonly cited as an authority, "that a case is not to be cut into parts." But Lord ELLENBOROUGH there recognises the exception, that, "if any one fact be adduced by the defendant to which an answer can be given, the plaintiff must have an opportunity given for so doing." In this case the defendant's evidence that the plaintiff had denied that the action was brought with his authority was a new fact. It appears too, from a note to *Browne v. Murray*, Ry. & M. 255, that ABBOTT, C. J., did not follow the former practice, but was in the habit of allowing evidence to be given in reply to evidence of the defendant impeaching the consideration for bills of exchange, if no suspicion had been cast on the plaintiff's title by *cross-examination of his witnesses; and [*428 the case of *Browne v. Murray* is itself an authority for the plaintiff. It was an action for libel; and the plaintiff was not allowed to

(a) Before Lord DENMAN, C. J., COLERIDGE and WIGHTMAN, J.

give evidence in reply to the defendant's justification; but that was because he had already given evidence in chief on the same point: and ABBOTT, C. J., said that a plaintiff might, if he pleased, content himself in the first instance with proof of the libel, leaving it to the defendant to prove his justification; and might then, in reply, rebut the evidence produced by the defendant. In *Williams v. Davies*, 1 C. & M. 464, S. C. 8 Tyr. 388, where the defendant pleaded a set-off, it was held that the plaintiff was not obliged to prove the whole of his account in the first instance, but might prove only the balance which he claimed; and that, after the defendant had proved his set-off, the plaintiff might prove other parts of his account to show that a larger sum was due. [COLERIDGE, J. The set-off is independent of the plaintiff's case.] The proof of a balance was proof of something due to the plaintiff on *both* accounts, so that he was, in effect, allowed to split his case. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The question in this case was, whether the learned Judge was right in refusing to allow a witness of the name of Lawrence Levi to be called by the plaintiff in reply, upon the trial of an issue whether a bill of exchange had been endorsed to him, the plaintiff, or not.

*424] The issue was single; and the onus of proof was upon *the* plaintiff. He might either rely upon a *primâ facie* case or go into all the evidence he had to confirm the *primâ facie* case; but we think that he was not entitled to rely, in the first instance, upon a *primâ facie* case upon that issue, and afterwards, when that *primâ facie* case was called in question by the defendant, to call other evidence to *confirm* his *primâ facie* case. It was not proposed to call Lawrence Levi to *contradict* any statement made by the defendant's witnesses, but to *add a fact* tending to confirm the plaintiff's *primâ facie* case. This we think he was not entitled to do, if objected to, and that the learned Judge was right in refusing to allow him to call the witness.

Rule discharged.(a)

(a) Reported by H. Davison, Esq.

END OF HILARY TERM.

HILARY VACATION.(a)

[*425]

HUTT v. MORRELL and Another.

To a declaration in trover for pigs, wheat, straw, and other chattels, defendant pleaded that C. held a farm, as tenant to defendant, by demise, for a term; and justified the taking, within six calendar months after the expiration of the term, and while C. was in possession of the said farm, and the pigs, &c., were thereon, as a distress for rent arriere. Replication, as to wheat, straw, pigs, &c., parcel of the cattle, goods and chattels, that plaintiff had sued out a fi. fa. on a judgment against C., under which writ the sheriff seized farming stock, goods, chattels, and growing crops of C., on the said farm, and, within a reasonable time afterwards, and before the distress, assigned to plaintiff, by agreement, the farming stock, goods, chattels, and the growing crops, out and uncult, in satisfaction of the debt, &c., plaintiff thereby agreeing not to carry off, or dispose of for the purpose of being carried off, any straw threshed or unthreshed, *except such wheat straw as C. had, or, in case the execution had not been levied, would have had, a right to dispose of, or any straw of crops growing, except as aforesaid, or any chaff, &c.* (as in stat. 56 G. 3, c. 50, s. 1), being the produce of the farm, but that he should use and expend the same, *except as before excepted, on the farm, according to the custom of the country*: That the wheat and straw in the declaration mentioned were the produce of the said growing crops, *having at the time when, &c., been severed from the soil, and continuing on the farm*: That the pigs were kept and used by plaintiff on the farm for consuming the straw, under the statute and the agreement: and that, when defendant distrained, a reasonable time had not elapsed for the consumption of the straw.

Held, in Q. B., on special demurrer, a bad replication, because it did not negative the case (mentioned in sect. 3) of a covenant or written agreement being shown to exist at the time of the assignment, and therefore did not make it appear that the pigs, which were distrainable at common law, were protected by the statute: And, also, because it did not appear that the wheat straw distrained was not such as, within the exception in the agreement, C. had a right to dispose of.

To the same plea, and as to the residue of the cattle, goods and chattels, plaintiff replied that, at the time of the distress, C. was in possession of only part of the farm, and the said residue of the cattle, goods and chattels was not on that part: concluding with a verification.

Held, in Q. B., on special demurrer, that the replication was bad, and that the plaintiff ought to have traversed the averment that C. was in possession of the farm, or the averment that the goods, &c., were on the farm; or else to have new assigned.

Held by the Court of Exchequer Chamber, that the first part of the replication was bad in substance, because it did not expressly show either that no part of the straw or produce was such as the plaintiff might have removed at the time of the assignment, or, if any was so removable, that a reasonable time for removing it had not expired at the time of the distress. Judgment affirmed on this ground.

Held also, by the same Court, that the second part of the replication was bad, for that the plaintiff ought to have traversed the allegation, as pleaded, that the pigs, &c., were on a farm of which plaintiff had been tenant and was in possession.

TROVER for cattle, goods, and chattels, to wit, 10 pigs, 10 swine, 100 tons of wheat, 100 tons of straw, 100 tons of barley, &c. (like quantities of clover, *oats, vetches, peas, and hay), ten tons of flour, and various articles of furniture, &c. [*426]

Last plea: That Mary Cox held a farm called, &c., in the parish, &c., in the county of Berks, as tenant thereof to defendants, by a demise for a certain term at the yearly rent, &c.; that, on 29th September, 1842, rent was in arrear, and the same so continued at the time when, &c.

(a) The Court of Queen's Bench sat in Banc on the 1st and three following days, on the 8th and four following days, and the 26th, of February.

That the cattle, &c., in the declaration mentioned, were, at the time when, &c., in and upon the said farm; wherefore defendants, at the time when, &c., and within six calendar months next after the said 29th September, and next after the conclusion of the said term, and during the continuance of the title and interest of defendants in the farm, and while Mary Cox was still in possession of the said farm, (a) did enter into and upon the said farm, and did then and upon the said farm seize, take, and distrain the said cattle, goods, &c., so being upon the said farm, as and for a distress, &c., and took and impounded, &c., according to the statute, &c.; and, the same not being replevied, defendants, at the time when, &c., sold, &c.: which is the said conversion, &c. Verification.

Replication, so far as relates to the said pigs, swine, wheat, straw, barley, oats, vetches, peas, and hay, parcel of the said cattle, goods, and chattels, &c.: That, before the time when, &c., viz. on, &c., plaintiff, by the consideration, &c.: stating judgment recovered by plaintiff in Q. B. against the said Mary Cox and one Richard Cox for a debt and damages, and *fi. fa.* at plaintiff's suit directed to the sheriff of Berkshire to levy of the goods and chattels of M. and R. Cox in his bailiwick the said *debt and *427] damages, &c.; which writ, endorsed to levy 570*l.* 8*s.*, and interest, &c., was delivered, &c., by virtue of which writ the sheriff, afterwards and before the time when, &c.; and during the said term in the plea mentioned, viz. on, &c. (6th July, 1842), seized and took in execution certain farming stock, goods, chattels, and effects, and also the crops of Mary Cox, then sown and growing in and upon the said farm, to wit, 10 acres of wheat, 10 acres of barley, 10 acres of oats, 10 acres of vetches, 10 acres of peas, and 10 acres of grass, then growing in and upon the said farm: And thereupon, within a reasonable time afterwards, and before the said time when, &c., and before defendants entered, seized, &c., as in the plea mentioned, and whilst the writ was in force, to wit, on, &c., by a certain paper writing then made and subscribed as well by the said sheriff, to wit, &c. (naming him), as by the plaintiff, the said sheriff, in satisfaction to the extent of 488*l.* 6*s.* (at which sum the said farming stock, goods, chattels, effects, and growing crops, so seized, &c., as aforesaid, had been valued), towards the said 570*l.* 8*s.* and interest, &c., assigned to the plaintiff the said growing crops and crops of corn, cut and uncut, severed or not severed, and the farming stock, goods, chattels, and effects so taken in execution as aforesaid and then being on the said farm, habendum to plaintiff, his executors, &c., as his and their own goods and chattels: and the plaintiff thereby agreed with the said sheriff that plaintiff should not carry off, nor sell or dispose of for the purpose of being carried off, from the said farm any straw threshed or unthreshed, *except such wheat straw as the said M. Cox and R. Cox had a right to sell or dispose of, or would have had a right to sell or dispose of in case the said execution*

(a) See stat. 8 Ann. c. 14, ss. 6, 7.

had not been levied, *or any straw of crops growing *except as* [428
aforesaid, or any chaff, fodder, (a) or turnips, or any manure, com-
 post, or ashes, nor any hay, grass or grasses, natural or artificial, nor
 any tares or vetches, nor any roots or vegetables, being the produce of
 the said farm, but should use and expend the same, *except as before*
excepted, on the said farm, in such manner as would accord with the cus-
 tom of the country: And the said sheriff, so far as he lawfully might,
 &c., did thereby allot, &c., to plaintiff the use of the following buildings,
 &c., on the said farm, namely, &c, until 25th March then next, for using
 and consuming the said straw, chaff, &c., thereby sold and assigned.
 Averment that, at the said time when, &c., the said wheat, straw, barley,
 oats, vetches, peas, and hay, in the declaration mentioned, were the pro-
 duce of the said growing crops so seized and taken in execution as afore-
 said, and after the said seizing and taking in execution, and before the
 time when, &c., to wit, on, &c., cut and severed from the soil of, and,
 thenceforth until and at the said time when, &c., still continuing on, the
 said farm: And that, at the said time when, &c., the said pigs and swine
 were beasts kept and used by plaintiff on the said farm for the purpose of
 consuming the said straw and other produce, under the provisions of a cer-
 tain act, &c. (56 G. 3, c. 50), intituled "An act to regulate the sale of
 farming stock taken in execution" (b) and the said agreement of the
 plaintiff. And *that, at the time when defendants entered, [429
 seized, and distrained as in the plea mentioned, a reasonable time

(a) Sic.

(b) Stat. 56 G. 3, c. 50, s. 1. "Whereas it is expedient that the execution of legal process should be so regulated, as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm;" "Be it enacted," &c., "That from and after," &c., "no sheriff," &c., "shall, by virtue of any process of any court of law, carry off or sell or dispose of for the purpose of being carried off from any lands let to farm, any straw threshed or unthreshed, or any straw or crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes or seaweed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay," &c., "ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements, such sheriff or other officer shall have received a written notice before he shall have proceeded to sale."

SECT. 3. "Provided always, and be it further enacted, That such sheriff or other officer executing such process may dispose of any crops or produce hereinbefore mentioned, to any person or persons who shall agree in writing with such sheriff or other officer, in cases where no covenant or written agreement shall be shown, to use and expend the same on such lands, in such manner as shall accord with the custom of the country; and in cases where any covenant or written agreement shall be shown, then according to such covenant or written agreement; and after such sale or disposal so qualified," &c.: liberty to vendee to use all necessary barns, buildings, &c., for the purpose of consuming such crops or produce, as the sheriff, &c., shall assign, and which such tenant or occupier would have been entitled to and ought to have used for the like purpose on such lands.

SECT. 6. "And be it further enacted, That in all cases where any purchaser or purchasers of any crop or produce hereinbefore mentioned shall have entered into any agreement with such sheriff or other officer, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw,

*430] *had not elapsed for the plaintiff to consume the said straw and produce according to the said agreement and the provisions of the said act. Verification.

And, as to the plea lastly pleaded, so far as the same plea relates to the residue of the said cattle, goods, and chattels: That, at the time when, &c., and at the time when defendants so entered, &c., and distrained, as in the said plea mentioned, the said Mary Cox was in possession of part only, and not of the whole, of the said farm: and that the said residue of the said cattle, goods, and chattels was not, nor was any part thereof, on the said part of the said farm then in the possession of the said Mary Cox. Verification.

Demurrer, assigning for causes, among others: As to the first part of the replication: That it does not appear that defendants had any notice of the sale, seizure, or agreement, or that the goods, crops, &c., distrained upon were affected thereby; nor that the sheriff was authorized to sell the goods, crops, &c.; nor that they were not goods exempted from an execution, &c.: nor that the plaintiff entered into any agreement in writing with the said sheriff, nor that he entered into any agreement according to the provisions of the statute, nor that this was a case in which no covenant or written agreement was shown to the said sheriff to use and expend the said goods, crops, or produce upon the lands, nor whether there was or was not any such covenant, &c.; nor whether there was any custom of the country, nor what it was if any, nor whether the agreement entered into by the said paper writing was in conformity with the custom, nor whether the said goods, crops, or produce were, at the said time when, &c., upon such lands in conformity with the custom, *431] *nor whether the custom was not for the landlord to distrain under such circumstances, &c.; nor that the said goods, crops, and produce were not such as might be distrained upon, nor that they were in any way exempted from distress by the said statute or otherwise, nor that the said goods, &c., were not such straw and other articles as the tenants might have removed from the said farm consistently with some contract in writing; nor that the said goods, &c., were sold subject to the said agreement, nor that the said wheat, barley, oats, or peas were in any way referred to by the said agreement, nor that the said straw was not such straw as was excepted by the said agreement, nor that the said Mary Cox and Richard Cox, or the said Mary Cox alone, might not have

or other produce thereof, which, at the time of such sale and the execution of such agreement entered into under the provisions of this act, shall have been severed from the soil, and sold, subject to such agreement, by such sheriff or other officer; nor on any turnips, whether drawn or growing, if sold according to the provisions of this act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any wagons, carts or other implements of husbandry, which any person or persons shall employ, keep, or use on such lands, for the purpose of threshing out, carrying, or consuming any such corn, hay, straw, turnips, or other produce, under the provisions of the act, and the agreement or agreements directed to be entered into between the sheriff or other officer, and the purchaser or purchasers of such crops and produce, as hereinbefore are mentioned."

sold the said straw, &c. ; nor that the said pigs and swine were upon the said farm in conformity either with the said statute or the said agreement, nor that the said pigs, swine, crops, or produce were upon the parts of the said farm assigned by the sheriff for that purpose ; nor that a reasonable time had not elapsed for using and expending the said goods, crops, and produce on the said lands, &c. And, as to the last part of the replication : that it neither confesses and avoids nor takes issue, &c. ; that it is an argumentative denial of the averment in the plea that Mary Cox was still in possession of the said farm, and also of the averment that the said cattle, goods, and chattels were, at the said time when, &c., upon the said farm, and also of other parts of the said plea ; and also that the said replication is an informal new assignment ; and that, the plea having confined the declaration to goods which were upon the place of which Mary Cox was in possession, the plaintiff ought to have new assigned if he wished to complain of the conversion of other goods in another place : and also that the said replication improperly concludes with a verification. Joinder in demurrer. [*482]

The demurrer was argued in the Queen's Bench in Hilary term, (a) 1847.

Aspinall, for the defendants. As to the first part of the replication.

First, the articles there mentioned were not privileged from distress independently of stat. 56 G. 3, c. 50. For the plaintiff, *Peacock v. Purvis*, 2 B. & B. 362, and *Wright v. Dewes*, 1 A. & E. 641, will be relied upon. But those cases decided only that growing crops seized in execution could not be distrained till a reasonable time had been allowed for their ripening. Here the goods seized were not crops growing on the land at the time of the distress ; and the pigs had been brought there merely to assist in the consumption, and were not protected from distress unless the statute applies. Secondly, the case is not brought within stat. 56 G. 3, c. 50, ss. 3, 6. The replication shows that the sheriff has sold the goods to be used and expended in such manner as shall accord with the custom of the country : but sect. 3 gives that power of sale only in a particular case, namely, where no covenant or written agreement between the landlord and tenant shall be shown : and it does not appear that no such covenant or written agreement was shown here. If the present allegations are sufficient a landlord might lose the benefit of a covenant expressly entered into for the purpose of taking the land out of the custom. Nor is it said that any custom of the country existed. Nor does it appear that these particular goods were the subject of the sale by the sheriff ; for the sale, as described in the replication, excepts certain articles ; and nothing appears here to show whether the goods in question were among the excepted or the unexcepted articles. Sect. 6, therefore, which protects from distress goods so sold by the

(a) January 15th and 19th. Before Lord DENMAN, C. J., PATTERSON, COLERIDGE and WIGHTMAN, J's. Some objections taken to the replication, and on which no judgment was pronounced, are omitted from the report.

sheriff, and beasts employed for the purpose of consuming under the agreement for such sale, does not apply here.

The second part of the replication is clearly an argumentative traverse of that part of the plea which asserts Mary Cox's possession of the farm as tenant to the defendants, and that the articles seized were on the farm so possessed by her. Had her possession been traversed, the defendants must have proved that she was possessed of the part on which the goods were seized. At any rate, the plaintiff should have been assigned.

John Henderson, contra. As to the first part of the replication. The rule is laid down in general terms in *Peacock v. Purvis*, 2 Br. & B. 362, and *Wright v. Dewes*, 1 A. & E. 641. Till the goods are carried away, they are in the custody of the law, and are not liable to distress by common law. It makes no difference that they were severed from the land before the distress. Stat. 8 Ann. c. 14, s. 3, carries out the same principle. [COLERIDGE, J. How are goods in the custody of the law after the sheriff has sold them?] There must be a reasonable time allowed *484] for taking *them away; and that is averred not to have expired; at least not a reasonable time for the consumption. But, even if a reasonable time had expired, that would be ground for an action on the case for keeping upon the land too long, not for distraining; *Hoskins v. Knight*, 1 M. & S. 245, 247. In *Wright v. Dewes* and *Peacock v. Purvis*, as here, the rent accrued after the seizure. The protection of stat. 56 G. 3, c. 50, is, therefore, not required, except so far as regards the pigs. As to the statute, the objection that the replication does not negative a covenant or written agreement cannot prevail: the plaintiff, who is a stranger, cannot know whether there be such contract or not. At all events, if the sheriff choose so to sell, the purchaser is not responsible for his not following the directions of the act. Else there never would be a purchaser, as was pointed out in *Wright v. Dewes*, 1 A. & E. 644, where it was suggested, on this ground, that the third section was directory only. The sixth section therefore applies, and protects from distress both the goods sold and the beasts used for consuming under the agreement mentioned in the replication. There is nothing, on these pleadings, to warrant the assumption that any part of the straw and produce in question was excepted from the agreement.

As to the last part of the replication. The plea is not traversed: it is only shown to be untrue as to a part; and a direct traverse would not have entitled the plaintiff to show the partial untruth. [WIGHTMAN, J. Why could not you have directly traversed the possession of the part in which the distress was taken?] That would have been a complex traverse. [COLERIDGE, J. *If the defendant had taken issue on *485] your replication, would not he have been re-affirming his plea?]

Aspinall, in reply. As to the last point, a general traverse of the possession would have been held to be a traverse of the possession of the part where the goods were taken; *Bond v. Downton*, 2 A. & E. 26.

As to the first part of the replication, the property, after seizure and sale, cannot be protected from distress for the whole time, however long, during which it is left on the premises. There is no averment that a reasonable time had not elapsed for removal of what might have been removable.

Cur. adv. vult.

Lord DENMAN, C. J., in the ensuing Hilary vacation (February 25th, 1847), delivered the judgment of the Court. His Lordship stated the substance of the declaration, plea, and replication, and then proceeded as follows.

To this replication there was a special demurrer, assigning a great many causes. But the main question was, whether, as to the produce of the growing crops and pigs, enough appeared to show that they were protected from distress for rent by stat. 56 G. 3, c. 50.

At common law, growing crops might be seized and sold under a *fi. fa.*, and were protected from distress (a) by the landlord, unless allowed to remain an unreasonable time upon the land. But, the general right being found to operate in many cases in a manner prejudicial to agriculture, the statute 56 G. 3, c. 50, was passed, to regulate the sale of farming stock taken in execution. The statute is in many respects restrictive of the rights which the execution creditor would have at common law; but in some respects it extends them. The sheriff is not to carry off, or sell to be carried off, straw and other enumerated articles, contrary to any written agreement made for the benefit of the landlord: but, by sect. 3, the sheriff may dispose of any crops or produce to any person who shall agree in writing with such sheriff, in cases where no covenant or written agreement shall be shown, to use and expend the same on the land in such manner as shall accord with the custom of the country; and, in cases where any covenant or written agreement shall be shown, then according to such covenant or written agreement. And, by sect. 6, landlords are not to distrain for rent on crops or produce sold subject to such agreement under the provisions of the act, nor upon any beast whatsoever kept or used upon the land for the purpose of consuming the produce under the provisions of the act and the agreement directed to be entered into between the sheriff and the purchaser of such produce as thereinbefore mentioned.

One of the causes of demurrer specially assigned was, that it was not stated in the replication, in order to warrant the agreement to consume the produce in such manner as would accord with the custom of the country, that no covenant or written agreement was shown; and that, in order to give the protection of the statute to some of the subject-matters distrained, which would otherwise have been distrainable at common law, the pigs for example, it was necessary to bring the case within the provisions of the act. In *Wright v. Dewes*, 1 A. & E. 644, it was doubted whether sect. 3 of stat. 56 G. 3, c. 50, was more than

(a) The distress was given by stat. 11 G. 2, c. 19, s. 8.

directory; for it was said that, if it were held otherwise, no person would buy crops under an execution. But a distinction may be taken where the right to sell and purchase is independent of the statute, as in the case of the crops themselves, which may be seized and sold at common law, and are at common law protected from distress, and those cases which are only protected by virtue of the statute: and, if it be necessary, in order to protect the pigs from distress, that an agreement was made with the sheriff, it should be stated to have been made according to the provisions of the act. The purchaser, in cases where no agreement is shown, is to agree to expend the produce according to the custom of the country; and he is only warranted in entering into such agreement where no covenant or written agreement is shown.

Another special ground of demurrer, relied upon by the defendants, was that, in the plaintiff's agreement, "such wheat straw as the said Mary Cox and Richard Cox had a right to sell or dispose of, or would have had a right to sell or dispose of in case the said execution had not been levied," was excepted, and that it was not shown in the replication that the wheat straw distrained and mentioned in the replication was not such as Mary Cox and Richard Cox had a right to sell and dispose of. This we consider a valid objection; as, for anything that appears, the wheat straw in question might have come within the exception.

These objections, which we think must prevail, render it unnecessary for us to consider any of the others specially assigned, except that which was taken to the replication as to the residue of the cattle, goods, *438] &c., distrained, that it was an argumentative denial of Mary Cox being in possession of the farm, and of the cattle, goods, &c., being upon the farm, or that it is an informal new assignment. We are of this opinion, and think that the plaintiff should either have traversed that Mary Cox was in possession of the farm, or that the goods, &c., were upon the farm, or have new assigned; and that, if the allegation in the plea was too uncertain to enable the plaintiff safely to have taken issue or to new assign, that he should have demurred specially on that ground.

Our judgment therefore in this case is for the defendants.

Judgment for defendants.(s)

(a) See the next case.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

HUTT v. MORRELL. Feb. 1.

(For syllabus, see p. 425, antè.)

THE plaintiff below brought error in the Exchequer Chamber: and the writ of error was now argued.

John Henderson, for the plaintiff in error (the plaintiff below), re-argued the points made in the Court of Queen's Bench for the plaintiff below. (a) [CRESSWELL, J. If it appears by this record that there may *have been any straw not protected by the statute, how is it protected at all? But for the statute, those things only would be [*439 exempt from distress which had remained on the premises for not more than a reasonable time.] If the goods seized remain on the land too long, the landlord's remedy is by action against the sheriff; *Hoskins v. Knight*, 1 M. & S. 245, 247. But the point suggested does not arise. There is nothing to show that any part of the straw or produce remained for an unreasonable time. [WILLIAMS, J. You do not aver that the straw was growing when assigned. If there was any not growing, it ought to have been removed at once. PARKE, B. You aver that the wheat, straw, &c., were, after the seizing and taking in execution, and before the time when, &c., cut and severed from the soil: but you do not show that they were not cut before the assignment. You should have alleged either that there was not at that time any removable straw or produce, or that, when the defendant distrained, there had not been reasonable time for removing such straw or produce.] This objection is not pointed out by the demurrer. [PARKE, B. It is matter of substance. The law gives you only a reasonable mode of doing what is necessary; you have to show that your proceeding was reasonable. If any removable straw was assigned, you had power to remove it, and were bound to do so instanter.] It is averred that "a reasonable time had not elapsed for the plaintiff to consume the said straw and produce according to the said agreement and the provisions of the said act." [PARKE, B. That is, to consume what you were bound to consume, and, it may be, something else.] No specific straw is pointed out. *And, when it [*440 is said that the pigs were kept and used on the farm "for the purpose of consuming the said straw and other produce," under the provisions of the act, "and the said agreement of the plaintiff," it must be intended, at least on general demurrer, that all the straw and produce

(a) As to the omission, in the agreement set out, to negative any prior agreement or covenant, he contended that, if such prior contract existed, it was a matter for a rejoinder. On the point that the purchaser ought not to be affected by an irregularity of the sheriff, he referred to the fourth and sixth sections of stat. 56 G. 3, c. 50.

were such as the pigs were to have consumed according to the agreement, and as remained unconsumed for want of reasonable time. [PARKE, B. You are to show by averment a substantial title against the landlord. CRESSWELL, J. The replication does not exclude a supposition that "the said straw and other produce" may comprise some that you were bound to remove and some that you were not. PARKE, B. Suppose the defendants had alleged that the straw and produce in question were not all kept for consumption on the farm, and issue had been taken, and the evidence had been that part was removable, and part was straw and produce for consumption.] The issue must have been found for the defendants. But then it would not have been true that the pigs were kept for the purpose of consuming "the said straw and other produce" "under" "the said agreement of the plaintiff." [PARKE, B. The words import only that they were kept to consume so much as you had a right to consume under that agreement.] The objection resolves itself into this: that the plaintiff fails to show that a reasonable time had not elapsed for disposing of all the produce before the distress took place. But the defendants ought not to have demurred; they should have rejoined that a reasonable time had elapsed. At all events the point cannot arise on general demurrer. [PARKE, B. The demurrer does seem to point out the objection, by the words "nor that the said goods, &c.," "were not such straw *and other articles as the tenants *441] might have removed from the said farm consistently with some contract in writing." But I cannot help thinking that the replication is bad on general demurrer.] The whole question is, on whom the burden lies of averring that a reasonable time had or had not elapsed.

Aspinall, for the defendants, was not heard.

PARKE, B. We are all satisfied that the replication is bad in substance, because it does not aver either that no part of the straw or produce was removable at the time of the assignment, or that a reasonable time for removing or disposing of the whole had not elapsed before the distress was made. *Primâ facie* all was removable from the time of assignment. You claim protection by statute, under an agreement with the sheriff; and you ought to show that you were exercising only such rights as the agreement gave. The right was only to have the property kept on the premises so long as was necessary for the purposes of the assignment; that is, if the crops were cut, till a cart could be brought to carry them away, and no longer; if standing, till they could be cut and removed, or consumed. It has been contended that the statement here is equivalent to an allegation that all the straw and produce were irremovable, and such as ought to have been consumed by beasts on the premises: but I think that is not a true construction. And, if it were, then come the objections on special demurrer, that it is not shown that, at the time of the assignment, no covenant or written agreement existed to use or expend the crops in a particular manner, nor, again, that the

straw *was not such straw as was excepted by the agreement with the plaintiff. But for the objection in substance first mentioned, [442 we should have wished to hear the other side on these points. As it is, without saying whether the Court below is right on these or not, we hold the replication bad because it does not show that some part of the straw and produce in question were not removable immediately on the assignment.

CRESSWELL and WILLIAMS, Js., and ROLFE and PLATT, Bs., concurred.

John Henderson then contended that the plaintiff was still entitled to judgment on the second part of the replication. No new assignment was wanted; and the conclusion was proper. The plaintiff, in this part of the replication, merely fixes the identity of the premises in question, by explaining what is the "said farm" mentioned in the plea. "Where a replication denies the whole substance of the defendant's plea, there the plaintiff may tender issue, and conclude to the country. But where he selects one out of several facts, he may traverse that one, and conclude with a verification;" per ASHHURST, J., in *Hedges v. Sandon*, 2 T. R. 439, 442. [PARKE, B. By the New Rules, Reg. Gen. Hil. 4 W. 4. General rules and regulations, 13, 5 B. & Ad. vi., "All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country." This part of the replication is a special traverse.] But only a partial one. The mere fact, that the tenant had given up part of the farm when the distress was made, would not have *prevented the operation of stat. 8 Ann. c. 14, s. 7: it was necessary [443 to add that the residue of the goods were not on the part retained: and the double averment required a verification. [PARKE, B. We made the new rule to avoid that necessity.] The plaintiff could not precisely traverse the averment in the plea, that Mary Cox "was still in possession of the said farm." [CRESSWELL, J. What need had you to deny she was in possession of the entire farm, they not affirming it?] Their averment, *primâ facie*, meant that she was possessed of the whole. If they had shown a distress made in any part of which she was possessed, they would have been entitled, on the plea, to succeed. [CRESSWELL, J. Then her being in possession of the whole was not material. PARKE, B. The plea, in substance, is, that the goods were taken on a place of which she had been tenant, and continued in possession. You should have traversed that.]

Aspinall, contra, was not heard.

Per Curiam (CRESSWELL, J., PARKE, ROLFE, and PLATT, Bs.(a)),
Judgment affirmed.

(a) WILLIAMS, J., had left the Court.

*444] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

ELIZABETH DOUGHTY v. BOWMAN and FULFORD. Feb. 2.

By indenture of lease, B., the lessee, for himself, his executors, administrators, and assigns, covenanted with the lessor to build four messuages on the land within a specified time from the date of the demise, and to pay rent, &c.; and there was a clause for re-entry on non-performance of this or certain other covenants. By a subsequent indenture, B. demised to plaintiff (the houses not having been built), and covenanted with plaintiff that B., *his heirs, executors, or administrators* (not adding *assigns*), would pay the rent reserved by the former indenture, and *perform, or effectually indemnify plaintiff of, from, and against, all the covenants therein contained on the lessee's or assignees' part to be performed.* B. afterwards assigned to defendants.

Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the covenant to plaintiff was not such a covenant as would pass with reversion of the land and bind assignees not named; and therefore that the plaintiff could not recover against the defendants for not building the wall or indemnifying plaintiff against eviction for breach of the covenant to build.

COVENANT. The declaration stated that, on, &c., "by a certain indenture then made between Joshua Scholefield, Esq., of the one part, and Edward Burt of the other part, the said J. Scholefield demised unto the said E. Burt certain unfinished messuages and certain lands," &c., in the indenture particularly described, habendum to him, his executors, administrators, and assigns, for ninety-nine years from September 29th, 1838, yielding and paying for the same the yearly rent therein mentioned: "and the said E. Burt did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree with and to the said J. Scholefield, amongst other things, in manner following, viz. that he the said E. Burt, his executors, administrators, or assigns, should and would, within the space of two years from the day of the date of the said indenture, erect and build upon the piece or parcel of land lastly thereinbefore described, and thereby demised, four or more good and substantial messuages *445] or *dwelling-houses, with necessary outbuildings," &c., "and finish the whole in a good and workmanlike manner," and expend 500*l.* in the erection of such messuages, &c.: and it was provided, and the indenture was upon the express condition, that, if rent were in arrear twenty-one days and no sufficient distress found, "or if the said E. Burt, his executors, administrators, and assigns, should neglect or fail in the performance or observance of any or either of the said covenants," the demise should thenceforth cease, and Scholefield might at any time after such breach re-enter. Averment that, after the making of the indenture, Burt entered and was possessed, &c., and being so possessed, afterwards, and before the expiration of two years, &c. (as above), and before either of the said messuages, &c., had been erected on the said piece of land, to wit, on, &c., "by a certain indenture then made between the

said E. Burt of the one part and the plaintiff of the other part" (pro-
 fert), "the said E. Burt, in consideration of the sum of 300*l.* to him lent
 and advanced by the plaintiff," &c., "demised unto the plaintiff all the
 premises comprised in and demised by the indenture firstly above men-
 tioned, to hold the same unto the plaintiff from the date of the last-
 mentioned indenture for all such residue of the said term of ninety-nine
 years as was then unexpired, save only the last day of the said term,
 freed and absolutely discharged, or otherwise by the said E. Burt, his
 executors, administrators, or assigns, effectually indemnified, from and
 against the said rent and the observance and performance by the plain-
 tiff of the said covenants: subject nevertheless to a proviso for redemp-
 tion thereof on payment to the plaintiff on the 29th day of March then
 next of the said sum of 300*l.* *and interest. And the said E. [*446
 Burt did, in and by the last-mentioned indenture, for himself, his
 heirs, executors, and administrators, covenant with the plaintiff that he
 the said E. Burt, *his heirs, executors, or administrators*, should and would,
 at all times thereafter during the continuance of the said mortgage secu-
 rity, well and truly *pay the yearly rent by the first above-mentioned inden-
 ture reserved, and also all taxes, rates, and assessments whatsoever pay-
 able in respect of the said premises, and observe and perform, or effectually
 indemnify the plaintiff of, from, and against, all and singular the pro-
 viso, covenants, and agreements therein contained on the lessee's or
 assignees' part to be observed and performed.* As by the last-mentioned
 indenture," &c. Averment that, under and by virtue of the last-men-
 tioned indenture, plaintiff entered and was possessed, &c., the reversion
 being in Burt; and that, while plaintiff was so possessed, and within
 two years from the date of the first-mentioned indenture, and before
 Burt had erected the said four messuages, &c., or any messuage, &c., on
 the said piece of land, to wit, on, &c., "all the estate and interest of the
 said E. Burt of and in the said demised premises, and all his right and
 title thereto, came to and vested in the defendants by assignments, who
 then and from thenceforth continually, until and at the time of the entry
 by the said Joshua Scholefield as hereinafter mentioned, became and
 were possessed thereof as assignees of the said reversion." Further
 averment, that Burt did not on the said 29th March or at any other time
 pay the 300*l.* or redeem the premises according to the said proviso in
 that behalf; and the 300*l.* remains unpaid: and "that the defendants,
 after they became so possessed as aforesaid, did not nor would observe
 or *perform, nor effectually or otherwise indemnify the plaintiff [*447
 of, from, and against, the covenants and agreements in the said
 first-mentioned indenture on the lessee's or assignees' part to be observed
 and performed, but, on the contrary thereof, the defendants wholly
 neglected so to do, and therein failed and made default in this, to wit,
 that the defendants *did not nor would*, but wholly neglected and refused
 to, erect or build within the space of two years from the day of the date

of the said indenture first hereinbefore mentioned, *or at any other time, upon the said piece or parcel of land* lastly in the said indenture described and thereby demised, *four good and substantial messuages or dwelling-houses, or any messuages or dwelling-houses whatsoever, and did not nor would*, nor did the said E. Burt, at any time, nor has either of them, *effectually or otherwise indemnified the plaintiff of, from, or against the said covenants.*" The count then stated that, after the expiration of the two years, and while defendants and plaintiff were so respectively possessed as aforesaid, to wit, on, &c., Scholefield, on account of the said breach of covenant, and by virtue and in exercise of the power in the first-mentioned indenture contained, lawfully entered and expelled plaintiff, &c., and retook the premises, and became repossessed as of his former estate; by means whereof the demise then ceased and became void, and plaintiff was deprived of the demised premises, and of the security, &c.

General demurrer by Bowman. Joinder.

Demurrer by Fulford, assigning for causes that the covenant alleged to have been broken is personal, and that assigns are not bound by it: *448] that the declaration does *not* show a sufficient cause of action against Fulford; and that no action at law can be maintained against him on the covenant contained in the deed set forth in the declaration. Joinder.

The demurrer was argued in the Court of Queen's Bench in Easter Term (April 27th), 1847, by *Joseph Addison* for the defendant Bowman, *Willes* for the defendant Fulford, and *Crowder* for the plaintiff. The arguments used and authorities cited will appear sufficiently by the report of the argument in the Court of Error.

LORD DENMAN, C. J. I am clearly of opinion that this is not a covenant running with the land.

PATTESON, J. I am of the same opinion. There are two sorts of covenants, the one binding the assignee of land whether named or not, the other not binding him unless he is named. If the covenant in question be considered as a covenant to build houses, then it relates to a thing not in esse at the time of the demise, and does not bind the assignee of the land, as he is not named; if it be considered as a covenant of indemnity, then it is conceded that the assignee is not bound.

WIGHTMAN and ERLE, Js., concurred. Judgment for defendants.

The plaintiff brought error in the Exchequer Chamber, and assigned, as special grounds, that the declaration shows a sufficient cause of action against Bowman and Fulford, and that an action at law lies against *449] them at the plaintiff's suit for the breach of the covenant in the indenture set forth in the declaration. And also that the said covenant was and is in the nature of a covenant for title, and was and is one which runs with the land and binds the assignee, though not named

in the said covenant in the said declaration mentioned. Joinder in error.

The writ of error was now argued.

Crowder, for the plaintiff in error (plaintiff below). The covenant declared upon binds the assignees, though not named. In its real effect (regard being had to the nature of the previous indenture) it is a covenant for quiet enjoyment. The case does not fall within the first resolution in *Spencer's Case*, 5 Rep. 16 a, where it was held that, if "the covenant" (to build a wall on demised land) "concerns a thing which was not in esse at the time of the demise made, but to be newly built after," it "shall bind the covenantor, his executors or administrators, and not the assignee." The resolution applicable here is the fourth in the same case, where it is said that, "if a man makes a lease for years by this word *concessi* or *dimisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant." *Merrill v. Frame*, 4 Taunt. 329, was relied upon in the court below, as showing that, if the plaintiff declares upon an express covenant for quiet enjoyment, which is found inapplicable, he cannot recover on the covenant implied by the word "demise." But in the present case, if the covenant to pay the rent and fulfil the stipulations of the lease passes *to [450 the assigns, a covenant for quiet enjoyment clearly passes also, and they are liable for a non-observance of the former covenants, by which the estate is lost. The authorities on this subject are collected, and the law explained, in Mr. Smith's note on *Spencer's Case*, 1 Smith's Lead. Ca. 27.(a) [PARKE, B. Is the covenant here anything more than a covenant to indemnify? And, if not, how can it run with the reversion, the assigns not being named?] The stipulations with the plaintiff are not to be considered as an alternative covenant; taken together they amount to a covenant for continued quiet enjoyment. [MAULE, J. Would not it have been a good assignment of a breach, to allege that the houses were not built? CRESSWELL, J. If the original covenant as to that had been broken, would not the now plaintiff have been entitled to damages?] Only nominal ones, if her possession had not been disturbed. The contract is that Burt shall perform his covenants with Scholefield, or indemnify the plaintiff against them. He is to see that she is not turned out. [MAULE, J. By any breach of the covenants in his lease. But there are other ways in which she might have been turned out so that a covenant for quiet enjoyment, if this were one, would have been broken.] In *Roe dem. Bamford v. Hayley*, 12 East, 464, it was held that a power reserved in a lease to the lessor, his executors or administrators, to give notice of determining the lease at the end of seven years, passed to a devisee of the reversion. [CRESSWELL, J. The power reserved was part and parcel of the subject of demise, and went with the

(a) See p. 29.

*451] reversion when the lessor granted that.] Other *instances are mentioned in the judgment delivered by Lord ELLENBOROUGH, (page 469). It was agreed, in *King v. Jones*, 5 Taunt. 418, that a covenant for further assurance runs with the land. A covenant by lessee, for him and his executors, to repair the house demised, binds an assignee though not named; so does a covenant "to discharge the lessor de omnibus oneribus ordinariis et extraordinariis;" The Dean and Chapter of Windsor's Case, 5 Rep. 24 a. The same law has been recognised as to a covenant to reside on the demised premises; *Tatem v. Chaplin*, 2 H. Bl. 133: and the principle on which these decisions rest is upheld in many other instances; among which are *Vyvyan v. Arthur*, 1 B. & C. 410, *Easterby v. Sampson*, 6 Bing. 644, (a) *Vernon v. Smith*, 5 B. & Ald. 1 (though this last case turned ultimately on a provision of the Building Act), and *Noke v. Awder*, Cro. Eliz. 373, 436, which was relied upon in *Campbell v. Lewis*, 3 B. & Ald. 392. (b) Assuming that the covenant declared upon consisted of distinct branches, still, if the undertaking to indemnify were omitted, the remaining covenant would be one which ran with the land: and, that being so, the assignees of the reversion were not less bound to fulfil the terms of the lease because an alternative undertaking was inserted in Burt's agreement with the plaintiff.

Joseph Addison, contra. The covenant is to indemnify, and therefore is personal and does not bind *the assignee. Burt promises the *452] plaintiff generally to perform the covenants in the lease, but does not stipulate with her for building the houses in any given time. Looking to the whole context, the reasonable construction is that Burt undertakes merely to save the plaintiff harmless as to these covenants, which he might do in other ways than by performing them. The plaintiff's case cannot be rested on a covenant implied from the demise. First, the lease is not set out, so as to show that the word *dimisi* is contained in it. And, secondly, if a covenant for quiet enjoyment were implied, the express covenants here, which are to a different effect, would supersede the implied one. The rule on this subject is found in 2 Bac. Abr. 342 (7th ed.), tit. *Covenant* (B), *Nokes's Case*, 4 Rep. 80 b (4th resolution), *Johnson v. Procter*, Yelv. 175, *Merrill v. Frame*, 4 Taunt. 329, *Shepp. Touchst.* 165, ch. 7, *Line v. Stephenson*, 5 New Ca. 183. (c) And, if there is not, here, any implied covenant for quiet enjoyment, neither is any expressed. It was asked by the court whether, according to the view taken on the other side, not building the houses would be a breach of the covenant; and the contrary was not maintained: and then there is an alternative, to indemnify, and the choice between the alternatives would surely be with the covenantor. [PARKE, B. Can part of the same

(a) In Exch. Ch., affirming the judgment of K. B. in *Sampson v. Easterby*, 9 B. & C. 505.

(b) The Mayor of Congleton v. Pattison, 20 East, 30, was also cited in the Court below, as explaining the rule of law.

(c) In Ex. Ch., affirming judgment of Common Pleas in *Line v. Stephenson*, 4 New Ca. 678.

covenant run with the land, and part not?] The defendants are not interested in so contending. There is nothing in stat. 32 H. 8, c. 34, s. 2, to authorize such a severance.

**Crowder*, in reply. The words of s. 32 H. 8, c. 34, are quite general. By s. 2, lessees and their assigns are to have the like remedy [453 against the grantees of reversions and their assigns "for any condition, covenant or agreement contained or expressed in the indentures of their lease and leases" as the same lessees might have had against the lessors and grantors. There is no legal distinction between express and implied covenants (except such covenants as the law implies); and this was laid down, with reference to a covenant for quiet enjoyment, in *Williams v. Burrell*, 1 Com. B. 402, 481. And, supposing that the covenant in question is for title or for quiet enjoyment, can it the less bind the assignee because it includes also a covenant for indemnity? [ALDERSON, B. Can you make one party or another liable for the breach of a covenant accordingly as the breach is one or the other of two things?] There is no case so stating: but there is not, in principle, any reason against it. [PARKE, B. You make the covenant operate as for quiet enjoyment because it is for indemnity. As a mere covenant to build, it would not pass to the assignee.] It is a covenant that, as far as the covenantor is concerned, there shall be quiet enjoyment: a covenant against those acts of the covenantor for which the lessor might evict, and by which, therefore, the covenantee might be damnified. [PARKE, B. It goes beyond that.] Not in any respect material to this case.

PARKE, B. We are all of opinion that the judgment must be affirmed. The covenant declared upon is, to perform certain covenants in an existing lease, or *to indemnify the plaintiff against the breach of them: [454 and the question is whether the liability under that covenant of Burt to the plaintiff passed with the land on assignment. Nothing turns on the covenant for quiet enjoyment said to be implied by the word "demise;" for no breach is laid corresponding to such a covenant; and it does not appear by the pleadings that the word "demise" was used. Now the mere covenant to perform the covenants of the lease, if it had stood without any alternative, would have had no other effect in this case than if the former covenants had been re-inserted, and would not have bound the assignee of the reversion to build, because it only professes to bind the covenantor, his heirs, executors or administrators. The first resolution in *Spencer's Case*, 5 Rep. 16 a, applies here: and so does the first of the two answers given by my brother PATTESON in the present case.(a) Assigns are not named; and the covenant, concerning a thing not in esse at the time of the demise, does not pass to assigns unnamed. Again, if the covenant declared upon presents an alternative, it is merely a covenant to indemnify. Is that, then, ad idem with a covenant for

quiet enjoyment, assuming that that covenant would pass? It is not. It might be broken in other ways than a covenant for quiet enjoyment, and is therefore larger. And it cannot be split merely because one breach of it may affect the estate, while the other is only collateral. We cannot say that the covenant passes with the estate because it is something larger than a covenant for quiet enjoyment. Mr. *Crowder* contends that the *455] covenant, taken all together, *may be treated as equivalent to an undertaking that the covenantee shall not be turned out. But a covenant to perform former covenants is different from a covenant that the lessee shall not be evicted; and it cannot be split. It must be considered as an undertaking to perform, or, in default of performance, to indemnify: and therefore it cannot pass with the reversion. I think the judgment given by my brother *PATTERSON* is quite right, though he has only expressed shortly what I have delivered more at length.

CRESSWELL and *WILLIAMS, Js.*, and *ALDERSON, ROLFE*, and *PLATT, Bs.*, concurred. (a) Judgment affirmed.

(a) *MAULE, J.*, left the Court after the argument for the plaintiff in error.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

LINDSAY v. LEIGH. Feb. 2.

In trespass for false imprisonment, it appeared that the plaintiff had been committed to prison by warrant of a justice under stat. 4 G. 4, c. 34, s. 3. The warrant alleged that the plaintiff (a collier) had been guilty of divers misdemeanors, particularly that he had absented himself from the service of his masters before the term of his contract with them was completed, contrary to the form of the statute, &c.

Held, that no conviction was necessary under the statute; and that the warrant, whether it was an order or in the nature of a conviction, was the only instrument contemplated by the legislature, and the legality of the imprisonment depended upon the sufficiency of that instrument alone.

And that, whether the warrant was to be construed with less strictness, as being in the nature of an order, or with greater strictness, as being in the nature of a conviction, it was bad, as it did not bring the case within the statute by averring either that the contract was in writing, or else that the service had been entered upon.

TRESPASS for assault and false imprisonment.

Plea, Not guilty (by statute). Issue thereon.

*456] On the trial, before *COLTMAN, J.*, at the Liverpool *Spring assizes, 1845, the defendant tendered a bill of exceptions, in substance, as follows.

The keeper of the house of correction at Kirkdale, in the county of Lancaster, deposed that the plaintiff below was received by him in the said house of correction on the 24th August, 1844, under the following warrant issued by the defendant below.

"County of Lancaster, } To the constable of Ince in Mackerfield in the said
to wit. } county, and to the keeper of the house of correction
at Kirkdale in the said county, and to each of them.

"Whereas information and complaint have been this day made unto me, the Honourable Colin Lindsay, one of her Majesty's justices of the peace in and for the said county, upon the oath of Adam Gregory, agent of James Whaley, Frederick Sewalis Gerard, and John Deakin, at their colliery at Ince in Mackerfield aforesaid, that William Leigh, of Wigan, in the said county, servant to the said J. W., F. S. G., and J. D., as a collier, at their works in Ince in Mackerfield aforesaid, hath, in his service with the said J. W., F. S. G., and J. D., been guilty of divers misdemeanors and ill behaviour towards his masters, and particularly that the said William Leigh hath absented himself from the service of the said J. W., F. S. G., and J. D., before the term of his contract with them was completed, contrary to the form of the statute in that case made: and whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined that the said W. L. *hath in his said service been guilty of divers misdemeanours, [*457 particularly that he the said W. L. hath absented himself from the service of the said J. W., F. S. G., and J. D., before the term of his contract with them was completed, and contrary to the form of the statute in that case made and provided: I do therefore convict him, the said W. L., of the said offence in pursuance of the statute in that case made and provided. These are therefore to command you, the said constable, forthwith to convey the said W. L. to the said house of correction at Kirkdale aforesaid, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you, the said keeper, to receive the said W. L. into your custody in the house of correction, there to remain to hard labour for the space of two months from the date hereof. And for your so doing this shall be your sufficient warrant. Given under my hand and seal" the 23d August, A. D. 1844.

"COLIN LINDSAY." (L. S.)

Leigh remained in the said house under colour of this warrant until the 17th September, 1844, and was during that time kept to hard labour. On the last-mentioned day he was discharged by virtue of a habeas corpus, and a liberate of WIGHTMAN, J., duly endorsed on the said writ.

On behalf of the defendant below the following conviction on parchment, under the hand and seal of the said defendant, which, it was admitted, was drawn up after the discharge of Leigh under the liberate, was put in evidence.

"County of Lancaster, } Be it remembered that, on," &c. (21st August, [*458
to wit. } 1844), "at Wigan, in the county of Lancas-
ter, Adam Gregory, of Ince in Mackerfield in the said county, under-

looker and manager of James Whaley, Frederick Sewalis Gerard, and John Deakin, then and still having and carrying on a colliery at Ince in Mackerfield in the said county, personally came before me" (the defendant below), "one of Her Majesty's justices," &c., "and informed me, upon the oath of the said A. G., that William Leigh, of," &c., "did, on the 4th April last past, contract with the said J. W., F. S. G., and J. D. to serve them as a collier at their said colliery, and that, after having on the same day entered into such service, according to his said contract,(a) was, in his said service with his said masters, guilty of divers misdemeanors, and particularly that he, on," &c. (9th August, 1844), "did absent himself from the service of his said masters before the term of his contract with them was completed, and has from thence hitherto continued so absent, contrary to the form of the statute in that case made and provided; whereupon, in pursuance of the statute in that case made, the said W. L. was, on this," &c. (23d August, 1844), "at Wigan in the said county, duly brought before me to answer the said complaint: Whereupon I, the said justice, did then and there proceed to examine into the nature and truth of the said complaint, in the presence and hearing of the said W. L.; and the said A. G., being a credible witness, did then and there, in the presence and hearing of the said W. L., upon his oath, depose and swear that the said W. L., then being *459] a collier, did, on," &c. (4th April, *1844), "contract with the said J. W., F. S. G., and J. D., then having and carrying on the said colliery at Ince in Mackerfield, in the county aforesaid, to serve them as a collier, at their said colliery, from the said" 4th April, 1844, "until the said W. L. should give to the said J. W., F. S. G., and J. D. fourteen days previous notice that he intended to quit the service," &c., "and had served them for such fourteen days; and that he, the said W. L., did afterwards, to wit, on the said" 4th April, 1844, "enter into the said service," &c., "as a collier at their said colliery, under and in pursuance of such contract for service; and that he, the said W. L., did continue to serve his said masters under and according to the said contract, at the said colliery, until the" 9th August, 1844; and, "the term of the said contract being then subsisting and incomplete, he the said W. L. did, on the said" 9th August, "absent himself from the said service against the will of" his said masters, "or either of them, contrary to the form of the statute in such case made, and that he had thence hitherto continued so absent: Wherefore, the said W. L. not denying the said evidence so given, it manifestly appearing to me that the said W. L. is guilty of the said offence charged on him as aforesaid, I do hereby convict him of the said offence, and do adjudge him for the said offence to be imprisoned in the House of Correction at Kirkdale in the said county for the space of two months from the date hereof, and during that time to be held to hard labour," &c. The conviction was dated the 23d August, 1844.

Adam Gregory, named in the conviction, deposed that he was "the underlooker, manager, and agent" of *Messrs. Whaley & Co., [460 the proprietors of a colliery at Ince, and that part of his duty was to hire the servants and colliers at the said colliery: and he deposed to the facts stated in the conviction. He also stated that he had laid an information of the facts before the defendant below. The information, which was in writing, was produced. The witness was therein described as "underlooker" to the Messrs. Whaley. The witness further stated that, after such information, a warrant was issued, under which Leigh was brought before three magistrates, of whom the defendant below was one, at the Wigan petty sessions, on the 23d August, 1844, and there convicted.

The learned Judge, upon this evidence, directed a verdict for the plaintiff below. The counsel for the defendant excepted to this direction, and contended that the jury ought to be directed that the defendant below, being a magistrate, and acting in a matter within his jurisdiction, was, according to the evidence of Gregory, justified in the commitment, and that the conviction given in evidence was a defence to the action. A verdict was found for the plaintiff below: and, judgment having been entered up on this verdict, a writ of error was brought in the Exchequer Chamber.

The case was argued in Easter vacation, 1847,(a) before WILDE, C. J., MAULE, CRESSWELL, and WILLIAMS, Js., and PARKE, ROLFE, and PLATT, Bs.

Couling, for the plaintiff in error, contended that the conviction was a defence, notwithstanding the liberate under the habeas corpus, as the latter proceeding was no matter of record, and did not affect the conviction, which was still subsisting: that the conviction was good, *although [461 it did not allege the absence from service to have been without lawful excuse; the excuse, as he argued, being matter to be affirmed by the party charged, and peculiarly within his knowledge: that, even if the conviction was bad, yet, until quashed, it was a defence, and that a magistrate could not be liable in trespass, where he had jurisdiction over the matter in question. But, as the judgment of the Court was given irrespectively of these points, a detailed report of the arguments upon them is deemed unnecessary. He then contended that the warrant itself, under stat. 4 G. 4, c. 34, s. 3, was equivalent to a conviction, and cited *Johnson v. Reid*, 6 M. & W. 124, 128. [PARKE, B. PATTESON, J., in *In re Gray*, 2 D. & L. 539, 548, has suggested a doubt whether a commitment of this sort must not set out the evidence on which it proceeds: and *Regina v. Tordoft*, 5 Q. B. 988, seems to show that the commitment must, in some respects, be construed as strictly as a conviction.]

Joseph Addison, contra. The only instrument authorized by stat. 4 G. 4, c. 34, s. 3, is a warrant of commitment. Such a warrant should set out the evidence; *John Hammond's Case*, 9 Q. B. 92; and should

state that the absence from service was without lawful excuse; Seth Turner's Case, 9 Q. B. 80; and that the contract of service was in writing, or that the service had been entered upon, in order to found the jurisdiction of the magistrate.^(a)

*462] *Cowling*, in reply. It is not necessary that the warrant should have the formalities of a conviction. The statute empowers the magistrate to abate the servant's wages in lieu of imprisonment. An instrument in the nature of a conviction would not be necessary in that case. *Cur. adv. vult.*

PARKE, B., now delivered the judgment of the Court.

This case came before us on a bill of exceptions to the direction of my brother COLTMAN, on the trial of an action of trespass and false imprisonment, brought by the plaintiff below against the defendant. It appeared that the plaintiff was committed to the house of correction at Kirkdale in Lancashire by a warrant under the hand and seal of the defendant Lindsay, a justice of the peace for the county of Lancaster, of which warrant this is a copy. (His Lordship read the copy of the warrant: see p. 456, *antè*.)

The plaintiff remained in prison under this warrant, and was kept to hard labour until he was discharged on habeas corpus by my brother WIGHTMAN.

The defendant put in evidence a conviction on parchment, under the hand and seal of the defendant, drawn up after the discharge of the plaintiff on the habeas corpus. This conviction purported to be on the information on oath of one Adam Gregory, "underlooker" and manager of Whaley and others carrying on a colliery, and states that the plaintiff contracted to serve Whaley and others, entered into such service, and absented himself from the said service before the term of his contract was completed; and proceeds to set out the evidence, and to adjudicate upon it in due form. *463] Adam Gregory was examined as a witness on the trial, and deposed that he was underlooker, manager and agent of Whaley and others: that he hired the plaintiff, who entered on the service and absented himself without lawful excuse. He also proved that he went before the magistrate, and deposed on oath to all the circumstances before mentioned relative to the plaintiff and to the colliery, and exhibited his information in writing, which, however, states him to be "underlooker" only. The information was produced and read.

In summing up, the learned Judge directed the jury that, if they believed the evidence, they ought to find a verdict for the plaintiff. This direction was excepted to; the plaintiff had a verdict; and the sole question is, whether the direction was right. We are of opinion that it was.

The case was elaborately argued before us, and some important ques-

(a) *Addison* also objected that the defendant below had no jurisdiction, as the written information had been laid by an "underlooker," who was not a person authorized by the statute to lay such information. Another objection was that the conviction, if otherwise available, was filed too late. See p. 466, *post*.

tions discussed, upon which it is unnecessary to give an opinion: for we think the commitment is bad upon grounds irrespective of some of those questions.

Mr. *Addison*, for the plaintiff, argued, and we think rightly, that, under the statute under which the commitment took place, 4 G. 4, c. 34 (for the sentence to hard labour cannot be supported under stat. 6 G. 3, c. 25), the legislature did not intend that there should be any other instrument to authorize the detention than a warrant or order of commitment, founded on a proper information by the master or his agent; that no conviction properly so called was required or authorized to be filed at the sessions; and that, if the warrant of commitment was defective, the imprisonment was unlawful *and could not be rendered legal by [*464 connecting it with a formal conviction. This is a question of the construction of the particular act of parliament under which the commitment took place; for it is just as competent to the legislature to authorize a magistrate to exercise a summary authority, out of the course of the common law, by a simple order, which shall be delivered to the person who is to execute it and be his warrant for so doing, and remain in his custody, as it is to authorize him to proceed by summons and conviction (which has to be filed at the sessions) and commitment thereon, though the latter is by far the more usual course. A reference to the statute 6 G. 3, c. 25, in *pari materia*, and the case of *Rex v. The Justices of Staffordshire*, 12 East, 572, which treats such an instrument as an *order* of commitment only, not a *conviction*, strongly confirms this view of the case; and the context in stat. 4 G. 4, c. 34, shows that, in dealing with cases brought before them by complaint of the master or manager, as in abating wages, an *order* is all that would be required. But, by whatever name this instrument is called, I think it clear that it is the only *instrument* which the legislature intended to exist in this case. This must necessarily be in the custody of the keeper of the gaol: and no mention is made, expressly or by implication, of any other instrument, still less of a formal record which is to be filed at the sessions, and form one of its records, as a conviction does. In the case of *Johnson v. Reid*, 6 M. & W. 128, I expressed an opinion that no conviction was necessary under this statute; to which opinion I adhere: but, whether this be an order, as indeed we think it is, or be in the nature of *a conviction, it being, as it seems to us, the only document the existence [*465 of which the legislature contemplated, the legality of the imprisonment must depend on the legality and sufficiency of that instrument alone.

Now, whether this instrument is to be construed with less degree of strictness, as being an order (*Rex v. Lloyd*, 2 Strange, 996), or with a greater degree, as being a conviction, as the Court of Queen's Bench in some recent cases (*John Hammond's Case*, 9 Q. B. 92) have intimated, I think the warrant is bad. Every instrument which is to affect a man's liberty or property out of the course of the common law ought, on the face of it,

to show the authority sufficiently; and we think this does not. We do not consider it necessary to say whether the objection is well founded, which appears to have prevailed in *Seth Turner's Case*, 9 Q. B. 80, (a) to a similar warrant, viz., that it does not state that the plaintiff "absented himself *without lawful excuse*," because we think that the commitment is invalid as it does not bring the case within the statute 4 G. 4, c. 34, by the averment either that the contract to serve was in writing, or that the service was entered upon, one of those two circumstances being essential to give the magistrate jurisdiction to commit to hard labour.

For this reason, we are of opinion that the commitment did not afford a justification to the defendant below. This view of the case makes it unnecessary to decide whether *this* conviction could be connected with *this* commitment, looking at the peculiar frame of it, and supposing that it was competent to the magistrate, under this statute, to support his *466] warrant by a proper *conviction filed at the sessions. Nor is it necessary to decide whether this conviction is bad on the face of it; nor whether, supposing it to have been otherwise unobjectionable, it was filed too late, and was in the same condition by reason of the plaintiff's prior discharge as if it had been filed after a former conviction quashed. These questions were fully argued: but, in the view we take of the case, they are immaterial.

And, being satisfied that the right to imprison the plaintiff, and keep him to hard labour, depends wholly on the validity of the warrant, being the only instrument contemplated by the act, we think the direction was right, and therefore the judgment should be affirmed.

Judgment affirmed. (b)

(a) See *Van Boven's Case*, 9 Q. B. 669.

(b) Reported by H. Davison, Esq.

ROE on the demise of SNAPE v. NEVILL. Feb. 3.

Testator, being seised of freehold and copyhold property, made his will, ordering, first, that his debts should be paid, and then devising to his wife, for her life, his dwelling-house, croft, and garden, part of the freehold, with remainder over. The will then proceeded: Also I give, &c., unto my said wife, her heirs and assigns for ever, all my real and personal estate whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to the uses of my will, and to have the same at my decease: but, if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same: And he appointed his wife and others executors.

Held, that the latter clause of the will did not revoke the former, but gave the wife, in addition to her life estate in the freehold house, croft and garden, an estate in fee in the copyhold and the other freehold property, leaving untouched the remainder created by the first clause.

EJECTMENT for a messuage or dwelling-house and garden, and a croft of freehold land, in the parish of Yoxall, Staffordshire. By consent of parties and leave of a judge, after issue joined, the following case was stated for the opinion of this Court.

*The lessor of the plaintiff is the heir at law of Mary Lester, [467 the person named in the will of Thomas Lester of Yoxall, Staffordshire, who, being seised in fee of the freehold dwelling-house, croft and garden sought to be recovered in this action, and also of other freehold land and of other copyhold land, made his last will, dated 8th February, 1810, duly executed, &c., in the words following.

"I, Thomas Lester, of," &c., "tailor, being of sound and disposing mind," &c., "do make this my last will and testament in manner following, that is to say : First, I desire to be decently buried at the discretion of my executors hereinafter named. And I will that all my just debts, funeral expenses and legacies, and the expense of proving this my will, shall be paid and discharged as soon after my decease as they conveniently can. Afterwards I give, devise and bequeath unto my dearly beloved wife Mary Lester, for and during the term of her natural life, my messuage or dwelling-house, and other buildings belonging the same, wherein I now inhabit and dwell, and the freehold croft and garden on which the said messuage and other buildings stands, and belonging to the same, lying and being in the parish of Yoxall aforesaid : And, from and after her decease, I give, devise and bequeath the aforesaid messuage or dwelling-house and other buildings, together with the said freehold croft and garden belonging the same, unto William Sharratt, of Yoxall aforesaid, tailor, Francis Sharratt, of the city of Lichfield, writing clerk, and Harriott Lester, daughter of Moses Lester of the city of Worcester, tailor, their heirs and assigns for ever, and to be equally divided amongst them. Also I give, devise and bequeath unto my said wife, Mary Lester, *her heirs and assigns for ever, all my real [468 and personal estate whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to the uses of my will, and to have the same at my decease : but, if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same. And I do hereby nominate and appoint my said wife Mary Lester, and Francis Sharratt, of," &c., "executors of this my last will and testament."

The testator died in 1819, leaving all the persons named in his will him surviving : and upon his death his widow, the said Mary Lester, entered into possession of the said first-mentioned premises, and also possessed herself of another piece of freehold land, the property of the testator, and continued in such possession until her death in November, 1835. Upon the death of the said Mary Lester, the said Francis Sharratt, who had purchased the respective reversionary shares of the said William Sharratt and Harriott Lester, entered into possession of the whole of the said first-mentioned premises : and thenceforth down to the present time the said Francis Sharratt, his mortgagees and assignees, and the said defendant, Robert Nevill, as the purchaser thereof, have possessed and dealt with the said premises as their own. The lessor of

the plaintiff attained his age of twenty-one years in the month of October, 1846.

The questions were: Whether the premises first above mentioned passed by the above will to William Sharratt, Francis Sharratt and Harriott Lester, after the death of Mary Lester, or whether the said devise to the said William Sharratt, Francis Sharratt and Harriott Lester, their heirs and assigns for ever, was superseded by the *subsequent devise to testator's widow Mary Lester, her heirs and assigns for ever. If the Court should be of opinion that the last-mentioned premises passed by the above will to the said W. S., F. S., and H. L., their heirs and assigns for ever, after the death of the said Mary Lester, then judgment of nolle prosequi was to be entered against Richard Roe immediately after the decision of the case or otherwise as the Court might think fit: but, if the Court should be of opinion that the said devise to W. S., F. S., and H. L. was superseded by the subsequent devise to Mary Lester, judgment was to be entered against defendant by confession for 40s. damages immediately, &c., or otherwise, &c., as the Court might think fit.

Whateley, for the plaintiff. The testator first orders, in general words, that his just debts, &c., shall be paid, and then devises his messuage, freehold croft and garden, to his wife; and, after her decease, to William and Francis Sharratt and Harriott Lester, in fee; secondly, he devises to his wife, absolutely in fee, all his real and personal estate, both freehold and copyhold, and charges the copyhold with his debts, if the personalty should be insufficient. The rule, as stated by Sir R. P. ARDEN, M. R., in *Sims v. Doughty*, 5 Ves. 248, 247, and *Constantine v. Constantine*, 6 Ves. 100, 102, is, that, if two parts of a will are totally irreconcilable, the last words must be taken to indicate the last intention. The law is so laid down in 1 *Jarman on Wills*, 411, 412, c. 15, where, among other authorities, *Co. Lit.* 112 b, *Crone v. Odell*, 1 Ball. & Beat. 449, **Odell v. Crone*, 3 Dow. 61, and *Sherratt v. Bentley*, 2 Mylne & K. 149, are cited; also in *Shepp. Touchst.* 402, ch. 23, and *Doe dem. Spencer v. Pedley*, 1 M. & W. 662, 675, S. C. Tyr. & G. 882, 896. Now the first devise here charges the real and personal estate with the debts, and then gives the messuage, croft and garden to the wife for life, with remainder over: the second devise gives all the freehold and copyhold to the wife, discharges the freehold from the debts, and charges the copyhold. The will, therefore, has two clauses, both clear, and each repugnant to the other. It is as if there were two successive wills; and the last must prevail. It may be argued, on the other side, that "all my real" "estate," in the last-mentioned clause, means all not previously disposed of; but to adopt that construction is making a will for the testator. This is not one of the cases where a general intent will govern; for it cannot be said that a general intent appears in either of the clauses.

Crowder, contra. Where a repugnancy appears between a prior and a latter clause, the whole must be looked at together; and the second clause may be qualified by reference to the first, as was done in *Adams v. Clerke*, 9 Mod. 154, and *Holdfast dem. Hitchcock v. Pardoe*, 2 W. Bl. 975. An Anonymous (a) case in *Dalison* is in point, or rather stronger than the present. "A man seised of lands in four counties devised the lands in three of the counties, part to his wife and the residue to other persons; and by other words of the same will he devised all his land to his wife, to dispose of after his death to the use and *benefit of [471 his son. And, by all the Court, nothing passed by these words of the will, but the lands in the fourth county, not mentioned in the will before."

Whateley, in reply. The case in *Dalison* is reported in a very few lines, and without any detail; and *Dalison* is not a reporter of high authority. (b) As far, however, as the report goes, it is an authority against the plaintiff. But the later decisions contradict it. *Ulrich v. Litchfield*, 2 Atk. 372, is a leading case on this subject: and Lord HARDWICKE there adhered to the doctrine that, where the same thing is given to different persons in different parts of a will, the latter words revoke the former.

Lord DENMAN, C. J. In *Ulrich v. Litchfield* the principal point was on the admissibility of parol evidence: the case also turned on the question whether the testatrix had not, in completing her will, changed her intention, and, in effect, revoked the former part. I think, here, we must look at the whole will, and, so doing, must give judgment for the defendant.

PATTESON, J. I am of the same opinion. Looking at the whole will, I can see no cause for doubt as to the intention: the only question is, whether we can make the words carry it out; and I think we can.

*WIGHTMAN, J. (c) The testator here had a freehold dwelling-house, croft, and garden, and a parcel of freehold property else- [472 where. He devises the house, croft, and garden to his wife, with remainder to the parties under whom the defendant claims. Then the will further says: Also I give unto my said wife, her heirs and assigns, all my real and personal estate, both freehold and copyhold, and now surrendered to the uses of my will. There is property answering to all these terms, part of which ("copyhold," "surrendered," &c.) is clearly not included in the former clause, and part may not be so included. The question is whether, by the latter clause, he intended to devise merely what was undisposed of before, or to give that and all the rest of his pro-

(a) Dal. 63, pl. 21.

(b) Lord DENMAN, C. J., and WIGHTMAN, J., referred to the unfavourable mention of *Dalison*, attributed to Sir H. Hobart, in Sir H. Grimston's preface to *Cro. Elis.* (prefixed sometimes, as in the folio, 1669, to *Cro. Car.*) WIGHTMAN, J., noticed also the commendation by Sir Robert Wright (dated 1687), prefixed to *Dalison's reports*, ed. 1689.

(c) Three Judges only were in Court.

perty. The Anonymous case in Dalison (Dal. 63, pl. 21), if to be relied upon, is an express authority for the former construction. In Ulrich v. Litchfield, the great question was on the admissibility of parol evidence. But there the testatrix had devised her real and personal estate to Elizabeth Travers and James Ulrich; and she afterwards, in the same will, left legacies and charged them upon her real estate, "if her personal estate should not be sufficient," and finally gave the residue of her personal estate to her uncle's three daughters, making Susanna Litchfield her executrix. And Lord HARDWICKE relied upon the clause which subjected the real estate to debts if the personalty failed, as showing an intention, in one event at least, to revoke the original bequest of the personalty, and so strengthening the conclusion that the testatrix meant to *473] revoke it altogether. *Here the testator finally charges his debts upon the copyhold estate (on failure of the personalty), leaving the freehold untouched: but that provision, connected with the rest of the will, does not fairly raise the same inference.

Judgment for defendant.

CHRISTOPHERSON v. BARE. Feb. 8.

To a declaration in trespass, charging that defendant assaulted plaintiff, imprisoned him, and kept him in prison, contrary to law and against his will, defendant pleaded that he committed the trespass by leave and license of plaintiff. On special demurrer, Held a bad plea, as amounting to the general issue so far as regarded the assault. *Quere*, whether the plea was not bad, for the same reason, as regarded the imprisonment?

TRESPASS. The declaration charged that defendant, to wit, on, &c., assaulted plaintiff, and then imprisoned him, and kept and detained him in prison for a long time, to wit, for the space of one month and twenty-five days, contrary to law, and against the will of plaintiff, and until plaintiff, in order to obtain his release, &c., was forced to and did procure an order of WIGHTMAN, J., for his discharge from the said imprisonment: damage by payment of moneys, &c.

Plea. That defendant, at the said several times when, &c., by the leave and license of plaintiff, to him for that purpose first given and granted, committed the trespasses in the declaration mentioned. Verification.

Demurrer. As to so much and such part of the plea as relates to the assaulting plaintiff, and imprisoning him, and keeping and detaining him in prison for the space of thirty-three days, part of the said space of one month and twenty-five days, that the same is not sufficient in law. For that the plaintiff's having given leave and license to commit the *474] trespasses cannot in law be a justification of the same. And for that the plea amounts to an argumentative plea of not guilty,

and is an argumentative traverse of defendant's having imprisoned plaintiff. And for that the plea ought to have concluded to the country.

Joinder in demurrer.

O'Malley, for the plaintiff. Leave and license cannot be pleaded by way of confession and avoidance of an assault or imprisonment. A party cannot be assaulted or imprisoned by his own consent. There are indeed acts which the law technically characterizes as trespasses in themselves, as to which leave and license may be pleaded: but these are cases in which the declaration would aver nothing inconsistent with the leave and license, but only that the defendant, for instance, broke and entered, &c. But that which, without license, would be an assault, ceases to be an assault where there is a license, as where a surgeon cuts the body of a patient at his request: there, if the declaration merely stated that the defendant laid hold of the plaintiff and cut and wounded him, leave and license might be pleaded: but, if the declaration were for an assault, the defence ought to be given in evidence under not guilty. This may be illustrated by the cases of indictment for assaults upon females under ten years of age with intent to ravish: the consent, in those cases, though it would not be an answer to the charge of completing the felony, negatives the assault; *Regina v. Banks*, 8 C. & P. 574; as it also does where the female is between ten and twelve years old; *Regina v. Martin*, 9 C. & P. 218, 215.(a) [PATTERSON, J. Such cases would not differ, as to the *question of assault, from cases of consent by a female above [*475 twelve years old. COLERIDGE, J. Leave and license, even where it could be pleaded in a civil case, is evidence for the defendant under Not guilty in criminal cases.] The authorities cited show the meaning of the word "assault." The imprisonment and detainer are here stated to have been against the will of the plaintiff: the leave and license is a traverse of that. The essence of the imprisonment (leaving this particular allegation out of the question) is that it is against the will of the party imprisoned; 14 Vin. Abr. 842, tit. *Imprisonment* (A) pl. 1, 2, citing 22 Assis. fol. 104 B. al. 85, and Yearb. 14 H. 6, fol. 2 B. pl. 12. Independently of the pleading question, a party cannot consent to be imprisoned; *Clark's Case*, 5 Rep. 64 a; (b) nor to an assault; *Bull. N. P.* 16. [PATTERSON, J. Suppose a man, who is subject to insanity, authorizes a friend to confine him during the prevalence of the attack, and afterwards, when the attack comes on, changes his mind, and objects to being confined.] He cannot, under such circumstances, be capable of a change of purpose. If he changed his purpose during a lucid interval, the confinement would be an assault: during insanity it would be justifiable, not on the ground of leave and license, but from the necessity of restraint. Indeed, during the actual insanity, the continuance of the assent could hardly be said to exist.

(a) See *Regina v. Reed*, 1 Den. C. C. 377.

(b) See *Leonard Watson's Case*, 9 A. & E. 781, 783.

Pearson, *contra*. An act is not the less an assault for being authorized by the party assaulted. [LORD DENMAN, C. J. What does the plea confess and avoid?] The imprisonment, at any rate. [LORD DENMAN, C. J. *That is laid to be against the will of the plaintiff: does the plea confess that?] No: that is a superfluous part of the declaration. The argument on the other side would, if correct, show that a trespass to personal property could not be justified: whereas authority for such a trespass must be specially pleaded; *Milman v. Dolwell*, 2 Campb. 378.(a) In *Regina v. Meredith*, 8 C. & P. 589 (where, as in the cases cited on the other side, it was held that a man could not be convicted of a common assault upon a female who consented), LORD ABINGER said: "To support a charge of assault, you must show an assault which could not be justified if an action were brought for it, and leave and license pleaded;" thus assuming that an assault might be confessed and avoided by a plea of leave and license. [PATTESON, J. That cannot be put higher than an obiter dictum.] In *Kavanagh v. Gudge*, 7 M. & G. 316, leave and license was pleaded to a declaration for breaking and entering the plaintiff's house, and assaulting and beating the plaintiff: and the plea succeeded. [COLERIDGE, J. In *Dicas v. Baron Brougham*, 1 Moo. & R. 309, the defence, that the alleged assault, battery, and imprisonment were under a commitment by the defendant as Lord Chancellor, was proved under Not guilty.] In *Taylor v. Smith*, 7 Taunt. 156, a defendant in trespass justified as for an act done to prevent the plaintiff from committing a tort: and it was held that the plaintiff could not prove, under *De injuriâ*, a license to commit the alleged tort, but must reply it. In *Lewis v. Davison*, 4 M. & W. 654, it was *477] assumed by the Court that *a party might consent to being arrested; and there PARKE, B., explained *Allen v. Rescous*, 2 Lev. 174, upon which the passage cited on the other side from Bull. N. P. 16, partly rests. A battery is illegal, as being a breach of the peace; and it may therefore be said to be illegal to consent to it: but here an assault only is justified. Further, the demurrer is bad, for attempting to divide an entire plea.(b) [WIGHTMAN, J. You cannot demur to a demurrer.(c)] But the Court must act on the justification set up, if it be not entirely answered.

O'Malley, in reply, was stopped by the Court.

LORD DENMAN, C. J. We need not decide whether an imprisonment can be confessed and avoided in this way: but, as to the assault, it is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission.

PATTESON, J. I doubt much as to the imprisonment: but, the

(a) See *Hill v. Fearnley*, 3 Q. B. 919.

(b) See *Wyatt v. Harrison*, 3 B. & Ad. 871.

(c) See note (a) to *Hinde v. Gray*, 1 M. & G. 201; *Monkman v. Shepherdson*, 11 A. & E. 411; *Slade v. Hawley*, 13 M. & W. 757, 761.

plea is clearly bad as to the assault; and, if bad for any part, it is bad for all. An assault must be an act done against the will of the party assaulted: and therefore it cannot be said that a party has been assaulted by his own permission.

COLERIDGE, J. If the plea had been only Not guilty, the defendant might have shown that the act was done in the course of sport between the parties, *and by the plaintiff's leave. This plea is therefore [*478 specially demurrable.

WIGHTMAN, J. I agree, and for the reasons already given.

Judgment for plaintiff.(a)

(a) See *Ringham v. Clements*, 12 Q. B. 260, 262.

WALKER v. MELLOR. Feb. 9.

In *indebitatus assumpsit* for goods sold and delivered, where there has been a sale in point of fact, the defendant cannot show, under *Non assumpsit*, that the plaintiff had no title to the goods at the time of the sale.

ASSUMPSIT for goods sold and delivered. Pleas: *Non assumpsit*, payment and set-off: on which issues were joined.

On the trial, before ROLFE, B., at the Liverpool Spring assizes, 1847, it appeared that, by an agreement in writing dated 28th October, 1846, the plaintiff agreed to sell and the defendant to buy all the bricks in a certain croft at 19s. per thousand; that the bricks were counted on the day of the contract, and possession of them given by the plaintiff to the defendant, who put up a bar and lock on the field where the croft was, and subsequently carried away two barge loads. The defence set up at the trial was, that certain parties, named Cook and Webster, had had prior dealings with the plaintiff for malt; and that, plaintiff being in their debt, they, on the 26th of October, agreed with the plaintiff's wife, by word of mouth, for the purchase of the croft of bricks at 20s. a thousand; and that, after notice of the sale by plaintiff to defendant, they took possession of a considerable portion of the bricks. The jury, by *direction of the learned Judge, found a verdict for the [*479 plaintiff.

In Easter term, 1847, *Watson* obtained a rule nisi to enter a verdict for the defendant, or a nonsuit.

Hugh Hill now showed cause. The facts proved at the trial constitute no defence to the action; if they do, they ought to have been specially pleaded. The sale to Cook and Webster, on the 26th October, by the plaintiff's wife, was incomplete; and no property passed. The contract was not sufficiently perfect to pass any property in the bricks until they had been counted, and their number ascertained. (On this point he cited *Simonds v. Swift*, 5 B. & C. 857, and *Tansley v. Turner*, 2 New

Ca. 151. The argument is omitted, as the judgment of the Court turned on the second point only.) Then, assuming that there had been a prior sale, in point of fact, by an authorized agent of the plaintiff to Cook and Webster, that sale should have been specially pleaded, as was done in *Allen v. Hopkins*, 18 M. & W. 94, where to an action for goods sold the defendant pleaded, in substance, that the plaintiff, pretending to be executor and to have a right to sell the goods, sold them to the defendant, plaintiff not being the executor, and having no right to sell them, and that the defendant paid the real administrator the value of the goods. [WIGHTMAN, J. What would be the nature of the plea here, if specially pleaded?] It would be an answer, if it alleged a sale under an express warranty by the vendor that the goods were his, and showed that they had been taken away by a party having a prior title, *480] and that the defendant had derived no benefit from the contract; or the plea might allege fraud. This would bring the case within *Jones v. Bowden*, 4 Taunt. 847, or *Peto v. Blades*, 5 Taunt. 657. Under Reg. G. Hil., 4 W. 4, *Pleadings in Particular Actions*, I. 1, 5 B. & Ad. vii., viii., in an action of indebitatus assumpsit for goods sold and delivered Non assumpsit operates as a denial of the sale and delivery in point of fact. The defendant cannot, therefore, show under Non assumpsit that, although there had been a sale to him, the goods had been previously sold to another. (He was then stopped by the Court.)

Watson and Tomlinson, contra. As to the question on the plea (assuming the sale by the wife to have been effectual), there is no direct authority. The old form of the count was "*goods of the plaintiff*" sold and delivered. The reason for striking out the words "*of the plaintiff*" was to meet the case of auctioneers and factors. But the plaintiff comes to prove that the goods are his. In *Allen v. Hopkins*, 13 M. & W. 94, the plaintiff was dealing with the goods as the rightful owner, but was defeated in his possession by matter ex post facto. If the action had been brought before the letters of administration were granted, he must have succeeded, because his title would have been unimpeached. But this is like the case, there put by POLLOCK, C. B., during the argument, of a groom selling his master's horse: the plaintiff had no title at the time of the sale, and therefore conferred none. If there is a sale and delivery in point of fact, the rule requires the defence to be specially pleaded; but this is a contract and delivery by a person without authority; *481] there was, therefore, no sale in point of fact. There must be a valid sale vesting the property in the vendee, to constitute a sale in point of fact. "If A. sell a horse to B. upon condition, that he pay 20*l.* at Christmas, and afterwards sell it to D., the sale to D. is void, though B. afterwards do not pay;" Com. Dig. *Agreement* (B 3), cited by HOLROYD, J., in *Tarling v. Baxter*, 6 B. & C. 360, 362. [WIGHTMAN, J. That is consistent with the argument here; but are not you to plead it?] I think the new rule suggests the material distinction. There

must, you say, be a sale in law: but the rule says sale "in point of fact." (a)] All matters "in confession and avoidance" are by a following rule (b) to be specially pleaded, "including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise." How could a sale be confessed here? [WIGHTMAN, J. Might not it be said (if such a plea would avail) that the plaintiff did sell and deliver, but without title?] The word sale has a legal signification. The count for goods bargained and sold shows this. The confession must be of a legal sale, which, *ex concessis*, this was not.

LORD DENMAN, C. J. I do not know how it can be said that there is no authority on this point, when the pleading is in the face of the New rules, and contrary to what they are expressly intended to provide, namely, that the plea should give the plaintiff information as to the defence. There cannot be a better reason for the rule in question than this, that a person shall not buy goods and then put the vendor, at the trial, to the proof that they were his at the time of sale. [482]

PATTESON, J. I do not see any difficulty in pleading the defence. The rule is that *Non assumpsit* operates as a denial of the sale and delivery in point of fact. The plea may confess that the plaintiff did sell and deliver in point of fact, and then show that the sale was void.

WIGHTMAN, J. This case falls expressly within the New rules. There has been a sale in point of fact; but the title of the vendor is defective. I take it that, if the sale is void in any way, the matter by which it is to be avoided must be pleaded specially. The rule expressly says that those matters which show the transaction to be void or voidable in point of law, "on the ground of fraud or otherwise," shall be specially pleaded.

Rule discharged. (c)

(a) Reg. G. Hil. 4 W. 4, *Pleading*, in *Particular Actions*, I. 1; 5 B. & Ad. viii.

(b) *Ib. ib.* I. 3; 5 B. & Ad. viii.

(c) Reported by T. Bros, Esq.

See *Ringham v. Clements*, 12 Q. B. 260, 264.

*483] *The QUEEN v. The Archbishop of CANTERBURY.(a)

H. having been, in pursuance of letters missive and congé d'élire, elected bishop of Hereford by the Dean and Chapter, letters patent issued to the Metropolitan, commanding him to confirm the election and consecrate H. The Metropolitan appointed commissioners for the purpose; and notice of the confirmation, to be performed at Bow Church in London, was published, with a citation of opposers. On the day named in the notice, the certificate of election was read; and opposers were publicly called to appear on pain of contumacy. Three clergymen, two of them holding benefices in the diocese of Hereford, then offered to appear, and claimed to put in a libel or plea, stating objections to the confirmation, on the grounds that H. had published works repugnant to the doctrine of the Established Church, and had been therefore censured by the University of Oxford. The Commissioners refused to hear the objections, and confirmed the election in the form usual where no opposition is made.

A rule nisi having been obtained, on behalf of the objectors, for a mandamus to the Metropolitan or his Vicar General to hear the objections: Held:

Per Lord DENMAN, C. J., and ERLE, J., that the objections could not be heard, stat. 25 H. 8, c. 20, making it imperative on the Metropolitan to confirm without taking cognisance of such objections:

Per PATTESON, and COLBRIDGE, J., that the objections ought to have been heard: or that, at least, there was ground for requiring a return.

No order was made.

But held that, if the objections ought to have been heard, the case was one in which a mandamus ought to have issued.

SIR FITZROY KELLY, in last term, obtained a rule calling upon The most Reverend Father in God, William, Lord Archbishop of Canterbury, Primate of all England and Metropolitan, and his Vicar General, Sherard Beaumont Burnaby, Doctor of Laws, to show cause why a writ of mandamus should not issue, commanding them, or one of them, at a Court to be therefore duly holden, in the cause, or business or matter, of the confirmation of the election of the Reverend Renn Dickson Hampden, Doctor of Divinity, to the *Bishopric of Hereford, to permit
*484] and admit to appear, in due form of law, the Reverend Richard Webster Huntley, Clerk, Master of Arts, of the University of Oxford, Vicar of Alberbury, in the county of Salop and diocese of Hereford, the Reverend John Jebb, Clerk, Master of Arts of Trinity College, Dublin, Rector of Peterstow in the County and Diocese of Hereford, and the Reverend William Frederick Powell, Clerk, Master of Arts of the University of Cambridge, perpetual curate of Cirencester in the county of Gloucester, to oppose the said confirmation of the said election of the said Doctor Renn Dickson Hampden, and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof.

The application was grounded on the affidavit of William Frederick Powell, of Cirencester, in the county of Gloucester, Clerk, perpetual Curate of Cirencester aforesaid, and Richard Edward Austin Townsend, of Doctors' Commons, Proctor and Notary.

(a) In preparing this report, much assistance has been derived from "A Report of the Case of the Right Rev. R. D. Hampden, D. D., by Richard Jebb, Esq., M. A., of Lincoln's Inn, Barrister at law," containing the speeches of the several counsel at length, from the shorthand writer's notes, and subjoining literal copies of all the important documents. The same work gives also a history of the origin and termination of the question.

Mr. Townsend deposed that he was one of the proctors or procurators general exercent, duly appointed, of the Arches Court of the Archbishop of Canterbury, and by virtue thereof entitled to practise in other Ecclesiastical Courts. That he was admitted as such proctor, and was well acquainted with the usage and practices of the said Court, and of the other ecclesiastical courts. That on 28th December, 1847, the Reverend Renn Dickson Hampden, D. D., "was howsoever elected(a) by the Dean and Chapter of the Cathedral Church of Hereford to the office or dignity of Bishop of the said diocese of Hereford, the same being theretofore vacant. And thereupon Her Majesty issued *her royal letters [*485 patent, bearing date the sixth day of January, 1848, and directed to his Grace the Archbishop of Canterbury." The affidavit then set out a copy. "Victoria," &c. "To the Most Reverend Father in God, our right trusty and right entirely beloved Councillor William, by Divine Providence Archbishop of Canterbury, Primate and Metropolitan of all England, and to all other Bishops herein concerned, greeting. Whereas, the Episcopal See of Hereford being lately vacant by the translation" of Dr. Musgrave, late Bishop thereof, to the Archiepiscopal See of York, "upon the humble petition of the Dean and Chapter of our Cathedral Church of Hereford, We did, by our letters patent, grant them our leave and license to choose to themselves another Bishop and Pastor of the said See; and the said Dean and Chapter, by virtue of our said license and leave, have chosen, for themselves and the said church, our trusty and well beloved Renn Dickson Hampden, D. D., to be their Bishop and Pastor, as by their letters sealed with their common seal, directed to us thereupon, does more fully appear: We, accepting of such election, have given our Royal Assent thereto; and this we signify unto you by these presents, requiring and strictly commanding you, by the faith and allegiance by which you stand bound to us, to confirm the said election, and to consecrate the said R. D. H., so as aforesaid chosen to be Bishop of the said See, and to do, perform, and execute, with diligence, favour, and effect, all and singular other things which belong to your pastoral office, according to the laws and statutes of England in this behalf made and provided. In witness whereof, we have caused these our letters to be made patent. Witness," &c.

*Mr. Powell deposed that, he and the Reverend Richard Webster Huntley, of the parish of Alberbury in the county of Salop [*486 and diocese of Hereford aforesaid, Clerk, Vicar of Alberbury aforesaid, and the Reverend John Jebb, of the parish of Peterstow, near Ross, in the county of Hereford and diocese of Hereford aforesaid, Clerk, Rector of Peterstow aforesaid, "being minded and of opinion, and verily believing, that good and valid objections existed to the confirmation of the said election of the said Dr. Hampden to the said see and bishopric of Hereford, they resolved and determined to oppose such confirmation,

(a) For the proceedings at the election, see Mr. Jebb's report, p. 1 & seq.

and accordingly instructed and gave their several proxies, in due form of law, to the deponent, R. E. A. Townsend, and Mr. Frederick Robarts, his partner, jointly and severally, to appear on their behalf, and oppose the said confirmation."

Mr. Townsend further deposed that, in obedience to such letters patent, and according to the usual course of proceeding in such cases, the said Archbishop, by his Vicar General, the Right worshipful Sherrard Beaumont Burnaby, Doctor of laws, Vicar general of the Province of Canterbury, assisted by the Right Honourable Stephen Lushington, Doctor of Laws and Judge of the Consistorial Court of London, and Sir John Dodson, Doctor of Laws and Master of the Faculties, as assessors, (a) for the purpose of proceeding with the cause, business, or matter of the said confirmation, proceeded in the said cause, business, or matter, *487] in manner next after mentioned. (b) That the see of Hereford is within the province of the Archbishop of Canterbury; and that the Court of the Vicar General of the said Archbishop for the confirmation of bishops elected within that province has, from time immemorial, been held at the church of St. Mary-le-Bow, in the city of London. That the Vicar General, so assisted as aforesaid, proceeded with the said cause, business, or matter of the confirmation, as after more particularly mentioned, on Tuesday, 11th January, 1848; a citation or mandate against all and singular opposers, calling upon them to appear and make their objections at the said Court on the day last aforesaid, having been first duly published in the said church, on or about the 8th January aforesaid, and a copy thereof having been affixed, and for some time left affixed, to the door of the said church, according to the law and practice of the said Court. That the Vicar General and assessors assembled in the dining-room adjoining the Common Hall of Doctors' Commons: and that Richard Underwood, Esquire, chapter clerk of the Dean and Chapter of the Cathedral Church of Hereford, notary public, appointed proctor of the said Dean and Chapter, together with John Burder, Esquire, notary public, and Francis Hart Dyke, Esquire, notary public and one of the procurators general exercent in the said Arches Court of Canterbury, exhibited proxy under the hands and seals of the said Dean and Chapter, and presented to the said Doctor R. D. H. a certificate of his being howsoever elected Bishop and Pastor of the said *488] Cathedral Church of Hereford, and prayed him to give his consent to the said election. And thereupon the said R. D. H. read the schedule of consent, and signed the same. And the Vicar General

(a) In the course of the argument, it appeared that the Archbishop had issued to Dr. Burnaby, Dr. Lushington, and Sir John Dodson, a commission to confirm the election. The commission is set out at length in Mr. Jebb's Report, p. 22, note (p). The material parts are noticed in the argument.

(b) A full account of the proceedings at Bow church will be found in Mr. Jebb's Report, p. 29 & seq.

immediately afterwards adjourned the business to the church of St. Mary-le-Bow.

Mr. Powell and Mr. Townsend then deposed that they attended in the said church on the said 11th January; when and where the Court for the confirmation of the election of the said Dr. Hampden as Bishop of Hereford was held before Dr. Burnaby, the said Vicar General, assisted by Doctor Lushington and Sir John Dodson as his assessors, as aforesaid. That, after prayers had been duly read, the business of the confirmation of the election of Doctor Hampden was commenced and proceeded in, by the presentation to the Vicar General of the aforesaid letters patent, which were read. Whereupon Mr. Underwood prayed the Vicar General to take upon himself the duty of the said confirmation, and decree that the same be proceeded in, according to the form of the said letters patent and exigency of the law. And, the Vicar General having signified his assent thereto, Dr. Hampden was presented to the Vicar General by Mr. Underwood, who then declared that he judicially produced Doctor Hampden as Bishop elect of Hereford: and Mr. Underwood further stated that, as proctor for the Dean and Chapter, he also exhibited an original mandate, together with the certificate thereupon endorsed, touching the execution of the said mandate, against all and singular opposers, and prayed that such opposers might be publicly called. That the Vicar General thereupon directed the apparitor general of the Court, then present, to make proclamation as is usual in such cases. Whereupon the apparitor general made proclamation, *in open court in the said church, in the words following: "Oyez! Oyez! Oyez! All manner of persons who shall or will object [*489 to the confirmation of the Reverend Renn Dickson Hampden, D. D., to be Bishop and Pastor of the Cathedral Church of Hereford, let them come forward, and make their objections in due form of law, and they shall be heard." That, immediately after such proclamation was made, and before any other proceedings were taken, Mr. Townsend addressed the Vicar General, and stated that he appeared as proctor for the Rev. Richard Webster Huntley, Clerk, M. A., of the University of Oxford, Vicar of Alberbury, in the county of Salop and diocese of Hereford aforesaid, the Rev. John Jebb, Clerk, M. A., of Trinity College, Dublin, Rector of Peterstow, in the county and diocese of Hereford aforesaid, and the Rev. William Frederick Powell, Clerk, M. A., of the University of Cambridge, Perpetual curate of Cirencester, in the county of Gloucester (the deponent); and he exhibited proxies under the hands and seals of the three last-named parties respectively, and then declared that he opposed the confirmation of the election of the said Dr. R. D. H. to the office or dignity of Bishop of Hereford aforesaid.

Mr. Townsend then deposed that, upon his addressing the Vicar General as last aforesaid, the Vicar General inquired of him what were his objections, or used words to that effect. That he, Mr. Townsend, had

such objections in writing then in his possession ; and that, whilst he was in the act of presenting such objections, which were in the form of a libel or plea, and were duly signed by advocates, as is usual in such cases, the Vicar General said to him : “ We are acting here under a mandate from *490] the Crown, issued pursuant to the *provisions of the statute of the 25 Hen. 8, c. 20 ; and we conceive ourselves bound to confirm, without suffering any opposition :” or words to that effect. That Mr. Townsend then said, in answer to the said inquiry of the Vicar General : “ Right Worshipful, I bring in a libel :” or words to that effect, he understanding that he was assigned by the Vicar General so to do. Whereupon Doctor Lushington, one of the assessors of the Vicar General, said to Mr. Townsend : “ No, you will not ; you are not permitted to appear : and, Mr. Townsend, you know perfectly well, as an ecclesiastical practitioner, that you are not able to bring in a libel until you are permitted to appear.” That the Vicar General then and there wholly refused to permit him to appear, as proctor as aforesaid, for the said three opposing parties, or any of them, or to exhibit his aforesaid proxies, or to present or bring in any libel, or plea or objections against the confirmation of the election of Doctor Hampden, or to do any act whatsoever in opposition to the confirmation of the election, although the said proxies and libel were in due form of law, according to the usage and practice of the said Court, and although Mr. Townsend then and there duly and at the proper time according to law offered and proposed to appear as proctor for the said opposing parties in the matter of the said opposition to the said confirmation, and to exhibit the said libel. That he had instructed certain advocates or counsel, namely, Doctor Addams, and Doctor Harding and Doctor Robert Phillimore, to appear on behalf of the said opposing parties, and oppose the confirmation of the said election ; and the said advocates or counsel then appeared *491] accordingly, and required to be heard. Whereupon *the Vicar General inquired of Doctor Addams whether he wished to be heard upon the question whether counsel had a right to be heard or not : and, Doctor Addams having replied that he did, the Vicar General said : “ We confine you to that :” and Doctor Lushington also then said to Doctor Addams : “ Distinctly understand to what you are confined, namely, the question, whether, considering the statute of Henry 8, which has been referred to, you have a right, notwithstanding that statute, to be heard at all :” or words to that effect. That thereupon the said advocates were heard at length upon the question whether they were entitled to appear and be heard. That, when they had concluded, Doctor Bayford, as counsel on behalf of Doctor Hampden and of the Dean and Chapter, or one of them, rose to reply to the observations of the said advocates : but the Court stopped him, and proceeded to give judgment, and decided that they could not hear any objections to the confirmation of the election, and that they were precluded by the said statute from

allowing any such objections to be entertained; the Vicar General delivering his judgment to the effect following, viz.: He was of opinion that the Court was bound to proceed to the confirmation of the election of Doctor Hampden to the bishopric of Hereford, under the provisions of the statute of 25 Henry 8, which clearly extended to the present case, and by which, if he should commit or suffer any let or hindrance to such confirmation, he should become liable to the penalties of præmunire: that the act itself prescribed no mode of proceeding in the performance of the duty enjoined, nor referred to any; and that the Court was bound by the statute law of the realm, which afforded it no alternative *but that of confirming the election which was certified to have been made by the Dean and Chapter of Hereford, or subjecting themselves to the penalties of præmunire. And Doctor Lushington and Sir John Dodson, as such assessors as aforesaid, then also severally expressed their opinions that the said opposers, their proctor or counsel, could not be allowed to appear or be heard, by reason of the said statute.

That, after the said judgment had been so given, the following proceedings took place. The Vicar General directed the confirmation to be proceeded with, according to the usual form; whereupon the said Proctor of the said Dean and Chapter openly said, in the presence and hearing of the said Court: "I accuse the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and, in pain of such of their contumacy, pray that they and every of them be precluded from the means of further opposing against the said election, the manner thereof, or the person elected in this behalf; and also that it may be decreed to be proceeded to further acts in this business of confirmation, the absence or contumacy of the persons so cited, intimated, publicly called, and not appearing, in anywise notwithstanding: and I porrect a schedule, which I pray to be read." That the said Proctor then handed in a paper to the Vicar General, which the Vicar General then read and signed, the contents of which were unknown to the deponent; and then the said Proctor proceeded, and stated as follows: "In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, I give this summary petition in writing, which I pray to be admitted; and that it be *decreed to be proceeded summarily and plainly, and that a term be assigned me to prove the same immediately." That the Vicar General replied as follows: "We do admit this your summary petition, so far as the same may be by law admitted, and do decree that it may be proceeded summarily and plainly; and we do assign you a term to prove this your summary petition immediately:" or words to that effect. Whereupon the said proctor then said: "In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and in support of proof of the matters contained in my said summary petition, I exhibit a certificate touching and concerning the election of the aforesaid Reverend R. D.

H., D. D., to be bishop and pastor of the said cathedral church of Hereford, made by the said Dean and Chapter of the said Church, and issued under their common seal. I likewise exhibit a public instrument of the consent of the said Doctor R. D. H. to the said election, and Her Majesty's letters patent before read. And I allege that all and singular the matters set forth in the said exhibits respectively were and are true, and so had and done as therein contained; and I pray all of them to be admitted, and that a term be assigned me to hear sentence instantly." That the Vicar General then said as follows: "In pain of the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing, We do admit these public instruments, and do assign to hear sentence instantly." That the said proctor then said: "I pray all and singular the said opposers to be again publicly called." That the Vicar General then said: "Let the opposers be again publicly called."

That the apparitor *general then made his proclamation as follows: *494] "Oyez! Oyez! Oyez! All ye who shall or may or will object to the confirmation of the Reverend R. D. Hampden, as Lord Bishop of the Episcopal See of the Cathedral Church of Hereford, now come forward and state your objections, and you shall be heard." That, after such proclamation made, the said proctor then said: "I accuse the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing; and I pray them to be pronounced contumacious; and, in pain of such their contumacy, that it be decreed to be proceeded to the pronouncing your definitive sentence; and I porrect a schedule, which I pray to be read."

That the said proceedings then terminated by Doctor Hampden taking the oaths usual and required in such cases: and the Vicar General signed, promulgated, and gave the following sentence in writing, that is to say: "In the name of God, Amen. We, S. B. Burnaby, Doctor of Laws, Vicar General and Official Principal, lawfully constituted, of the most Reverend," &c., "William," &c., "Lord Archbishop of Canterbury, Primate of all England and Metropolitan, being hereunto sufficiently and lawfully authorized, and having heard, seen, understood, and discussed the merits and circumstances of a certain business of confirmation of an election made and celebrated of the Reverend R. D. H., D.D., elected Bishop and Pastor of the Cathedral Church of Hereford, which is controverted and remains undetermined before us in judgment, and having considered the whole process had and done in the business of such confirmation, and having observed all and singular the matters and *495] things that by law in *this behalf ought to be observed: We have thought fit, and do thus think fit, to proceed to the giving our definitive sentence or final decree in this business, in manner following. Whereas, by the acts enacted, deduced, alleged, propounded, exhibited, and proved before us, relating to such confirmation, we have amply found, and do find, that the said election was rightfully and lawfully

made and celebrated by the Dean and Chapter of the said Cathedral Church of Hereford, of the said Reverend the Bishop elect, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, born in lawful wedlock, of due age, and an ordained priest, and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority Bishop of the said See: Therefore we, S. B. B., Doctor of Laws, the Judge aforesaid, having weighed and considered the premises, and with the assistance of the learned in the law, do, by the authority wherewith we are invested, confirm the aforesaid election made and celebrated of the person of the said Reverend R. D. H., D.D., to the Bishopric of Hereford. And we do, so far as in our power and by law we may, supply all defects in the said election, if any there happen to be. And we do commit unto the said Bishop elected and confirmed the care, government, and administration of the spirituals of the said Bishopric of Hereford. And we do pronounce, decree, and order, by this our definitive sentence or final decree, which we make and publish in these presents, that the said Bishop, so elected and confirmed, or his lawful proctor for him, shall be inducted into the real, actual, and corporal possession of the said Bishopric, and of *all its rights, dignities, honours, pre- [*496
vileges, and appurtenances whatsoever, and be installed and enthroned by the Archdeacon of Canterbury, or his deputy, according to the laudable and approved manner and custom of the said Cathedral Church, not being contrary to the laws and statutes of this realm." That the proctor then said: "The Lord Bishop elected and confirmed, and myself, pray a public instrument and letters testimonial to be made out, of and concerning the premises." Whereupon the Vicar General said: "We do decree as prayed."

That the forms and proceedings used and adopted in the said business or matter of the said confirmation were of the same tenor and description as the forms and proceedings used and adopted in suits and causes in the ecclesiastical courts; and that the same forms of citations, proclamations, summary petitions, or plea, proofs, sentence, and other forms, as were used and adopted in the said business or matter, have been, to the best of this deponent's information and belief, commonly used in the confirmations of the elections of bishops in England, ever since the said statute of the 25 H. 8 was revived in the reign of Queen Elizabeth.

Mr. Powell and Mr. Townsend then deposed that the opposition, so intended to be made to the then present confirmation of the election of the said Doctor R. D. H., was founded upon "two books written, printed, and published by him; the avowed purport or object of the first of the said two books being to illustrate the injurious effects of dogmatism in theology: and in both books, in illustration of the (supposed) effect of dogmatism in theology, it is well known, or justly suspected, that [*497
whether so by him intended or not, he *hath, in fact, spoken or

declared in the manifest derogation or depraving of many things in the Book of Common Prayer, and hath maintained or affirmed divers doctrines repugnant, or at least contrary, to the Thirty-nine Articles of the Church of England, especially those or most or many of them particularly concerning faith and doctrine." "That, expressly by reason of or with reference to such his two books aforesaid, he the said Doctor R. D. H. (then recently appointed Regius Professor of Divinity in the University of Oxford), in A.D. 1836, incurred the solemn censure of that University; and which censure (the said Doctor R. D. H. neither then nor since having in any manner explained or renounced or retracted those parts of his teaching which have led to his being so justly suspected as aforesaid) was in effect re-affirmed by the said University," in 1842. That articles, alleging and setting up such unsoundness of doctrine and teaching of the said Doctor R. D. H., had been prepared and signed by certain learned civilians, ready to be given in as aforesaid, had the said parties been permitted to appear; and which the deponents were advised and believed to present and contain sufficient ground of opposition to the confirmation of the said Doctor R. D. H., and the said R. E. A. Townsend was ready to bring in, in due form of law, as aforesaid, and then and there, if called on so to do, to sustain by proof.

Mr. Powell further deposed that this application for a mandamus was made with the consent and concurrence of the Reverend R. W. Huntley and the Reverend J. Jebb, the said other opposers to the said confirmation of the said election.

*498] *In the same term, (a)

Sir *J. Jervis*, Attorney General, Sir *D. Dundas*, Solicitor General, *M. D. Hill*, Dr. *Bayford*, and *Waddington* showed cause.

First, the Archbishop and Vicar General had no power to hear the objections; and therefore no one could appear in support of them. The confirmation is merely matter of form.

The question arises upon stat. 25 H. 8, c. 20, which was, indeed, repealed by stat. 1 & 2 P. & M. c. 8, ss. 9, 11, but was revived by stat. 1 El. c. 1, ss. 7, 10. (b) Stat. 25 H. 8, c. 20, is entitled "An Act for the non-payment of first fruits to the Bishop of Rome." (c) Sect. 3 states that in the recited statute 23 H. 8, c. 20, "it is not plainly and certainly expressed in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm," and enacts that the recited statute shall stand, except that no person "shall be presented, nominated, or commended to the said Bishop of

(a) The argument was heard on January 24th, 25th, 26th, and 27th.

(b) See Hargrave's note (5) [216] to Co. Litt. 134 a.

(c) It was pointed out that in 1 Gibs. Cod. 107, (ed. 2,) the title is "Of the electing and consecrating of archbishops and bishops within this realm;" and reference was made to stat. 8 Elis. c. 1, s. 2, and to stat. 1 Elis. c. 1, s. 7, where the title given is "An act restraining the payment of annates or first fruits to the Bishop of Rome, and of the electing and consecrating of archbishops and bishops within this realm;" also to the Statutes of the Realm (published by the Commissioners of the Public Records), vol. iii. p. 462, where it is "An act restraining the payment of Annates, &c."

Rome," "to or for the dignity or office of any archbishop or bishop within this realm," nor procure there "bulls, beeves, palls, or other things requisite for an archbishop or bishop," nor pay annates, first fruits, &c., for expedition of any such bulls, &c. *Sect. 4 enacts [*499 that, at every avoidance of an archbishopric or bishopric, the King may grant a license to the dean and chapter, &c., to proceed to election, "with a letter missive, containing the name of the person which they shall elect and choose: by virtue of which license the said dean and chapter," &c., "shall with all speed and celerity in due form elect and choose the same person named in the said letters missive," "and none other." If they delay above twelve days, the King may nominate and present by letters patent; and every such nomination and presentment, if to the office of bishop, shall be made to the archbishop and metropolitan of the province, if the archbishopric be full. By sect. 5, in the case of such nomination as last aforesaid, the archbishop or bishop to whom the nomination is directed, is to "invest and consecrate" "with all speed" the person nominated. And, if the dean and chapter, &c., "within the said twelve days do elect and choose the said person mentioned in the said letters missive," "their election shall stand good and effectual to all intents;" the person elected shall be reputed lord elected; "and then making such oath and fealty only to the King's Majesty, his heirs and successors, as shall be appointed for the same, the King's Highness, by his letters patent under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishopric was void, if the see of the said archbishop be full and not void;" "requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is *elected unto, [*500 and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf." By sect. 7, if the dean and chapter, &c., "after such license as is afore rehearsed, shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such license shall come to their hands; or else if any archbishop or bishop, within any of the King's dominions, after any such election, nomination, or presentation shall be signified unto them by the King's letters patents, shall refuse, and do not confirm, invest, and consecrate with all due circumstance as is aforesaid, every such person as shall be so elected, nominate, or presented, and to them signified as is above mentioned, within twenty days next after the King's letters patents of such signification or presentation shall come to their hands; or else if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, ex-

communications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act; that then" "every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run into the dangers, pains, and penalties of the statute of the provision and præmunire, made in the five-and-twentieth year of the reign of King Edward the Third, and in the sixteenth year of King Richard the Second."

*501] "As to the state of the law before the passing of this statute, it is a matter of much difficulty, as appears from 1 Burn, Eccl. L. Preface, p. xxvi. (9th ed.), to find out how far the canon law was allowed, where it was checked by the prerogative of the Crown or the common law, and indeed what it was. In *Cawdrey's Case*, 5 Rep. 32 b, Lord COKE says: "If it be demanded what canons, constitutions, ordinances, and synodals provincial, are still in force within this realm; I answer that it is restored and enacted by authority of Parliament, that such as have been allowed by general consent and custom within the realm, and are not contrariant or repugnant to the laws, statutes, and customs of the realm, nor to the damage or hurt of the King's prerogative royal, are still in force within this realm, as the King's ecclesiastical laws of the same. Now, as consent and custom hath allowed these canons, so no doubt by general consent of the whole realm, any of the same may be corrected, enlarged, explained, or abrogated."

From Aylliffe's *Parergon*, p. 126, et seqq., it appears that bishops were originally elected *per clerum et populum*, which included, of course, the laity: that afterwards, to prevent confusion, the Christian emperors reserved the election to themselves; the form being that the chapter, on a bishop's death, sent the ring and pastoral staff to the emperor, and he delivered it to the person whom he appointed successor: that afterwards the pope pretended that the emperors took money for the nomination or charged the episcopal revenues with pensions, and then the bishops were elected by the canons in cathedral churches, and the choice usually

*502] "confirmed at Rome: that nevertheless, in the Saxon times, all ecclesiastical dignities were conferred in Parliament, and were still donative by delivery of the ring and staff: that Pope Hildebrand, who was contemporary with William I., excommunicated all prelates who received investiture from any layman *per traditionem annuli et baculi*: that this assumption was disputed by the English kings, till Henry I. after a long contest yielded up the point, reserving only to himself homage in respect of the temporalities, to be done, however, before consecration: whereupon the archbishop consecrated the bishops whom the king had before appointed. Afterwards King John granted by charter(a) that elections of major and minor pre-

lati in cathedral and conventual churches and monasteries should be free, the *licentia eligendi* being first prayed of him, and reserving to himself a veto, and the profits during vacancy; if he refused the *licentia eligendi*, the chapter might proceed without it, and he was not to refuse his assent to the election made, "*nisi aliquid rationabile proposuerimus et legitime probaverimus, propter quod non debeamus consentire:*" but the King, nevertheless, continued to influence the elections, and usually sent for the dean and chapter, or some of them, who met in or near his royal chapel and chose the person he had recommended. This account from Aylyffe agrees substantially with that given in Co. Litt. 134 a, and 344 a. From Van Espen's *Jus Ecclesiasticum Universum*, p. 98, Part I. tit. 14, c. 1, § 8, 9, it seems that the confirmations came to the pope as a natural consequence of his having usurped the nominations. It may be pointed out that, between the charter of King John and the *passing of [503 stat. 25 H. 8, c. 20, stat. 25 Ed. 3 (of Provisors) was passed, which, after reciting stat. 35 Ed. 1, c. 4, s. 3 (statute of Carlisle), enacted (sect. 3) that the free elections of archbishops, bishops, and all other dignities and benefices elective in England were to hold as granted by the king's progenitors, and the ancestors of other lords, founders thereof; and that, where the pope made provision of a dignity of the church, the king should present "as his progenitors had before that free election was granted since that the election was first granted by the king's progenitors upon a certain form and condition, as to demand license of the king to choose, and after the election to have his royal assent, and not in any other manner."

Now, with respect to the canonical election before stat. 25 H. 8, c. 20, it was urged, on moving, that the steps may be collected from Lancelottus's *Institutiones Juris Canonici*, a work spoken of as having been cited with approbation by DODDERIDGE, J., in *Evans v. Ascuithe*, Palm. 457, 472.(a) Lancelottus, pp. 33, 34, lib. i. tit. 7, states various disqualifications of the parties electing or to be elected; among the latter, the being within age, the not being in other respects canonically qualified, &c. Then, in p. 39, lib. i. tit. 9, he says: "*Confirmatio non conceditur, nisi cum causæ cognitione.*" "*Is autem, ad quem confirmatio pertinet, diligenter examinare debet, et electionis processum, et personam electi. Est enim hoc generale, ut ad eum pertineat examinatio, ad quem manûs impositio spectat. Et cùm omnia ritè concurrunt, tunc munus ei confirmationis impendat. Quòd si secus factum fuerit, non solùm dejectendus erit indignè *promotus: verùm etiam indignè promovens puniendus.*" [504 "*Nihil est enim quod ecclesiæ Dei magis officiat, quam si indigni ad regimen assumantur animarum.*"(b) Afterwards, in p. 41, lib. i. tit. 9, where the heading is, "*In confirmatione faciendâ citandi sunt, quorum interesse potest,*" it is said: "*Illud etiam confirmantem observare oportet,*

(a) S. C. 1 (W.) Jones, 158; Latch, 31, 233; Noy, 93; 2 Roll. R. 450 (as Vaughan v. Ascue).

(b) See post, p. 533.

ne dum nimis in confirmando celeritate utitur contra doctrinam Apostoli proprium affectum juri et æquitati præponat. Itaque, si coelectus aliquis, vel contradictor apparet, ante confirmationem, nominatim vocandus est: alioqui si nemo apparet, in foribus ecclesiæ, in quâ electio facta est, generaliter edicendum erit, ut si qui sint, qui confirmationi futuræ velint opponere, ad contradicendum, in assignato peremptorio termino, præsentibus esse debeant. Quæ omnia locum habent sive concorditer electio fuerit celebrata, sive non." And then: "opponentes electioni, si deficiant in probationibus, sunt puniendi." The party confirming is to examine *personam electi*: the reason of which is, that there may have been, according to the then form of canonical election, a *coelectus*, on an equality of votes. Also, at the election, disqualified electors may have voted in numbers sufficient to determine the election: therefore, the *processus electionis* is to be examined into at the confirmation. The examination as to the *persona electi* would further comprehend, besides the case of a *coelectus*, a case where a *contradictor* had appeared at the election, who might then have raised objections founded on personal disqualifications; if such a *contradictor* had been overruled at the election, he might be heard at the confirmation, *505] which, so far, was in the nature of an appeal; and, for this purpose, he was to be called on, at the confirmation, by name. It is true that Van Espen (*Jus. Ecc. Univ.* p. 98, part I. tit. 14, c. 2, § 5) says that, touching the *persona electi*, the matters to be inquired into are "ætas legitima, morum honestas, et literatura sufficiens." For this, however, he refers to the fourth Lateran Council,^(a) which was never admitted into the canon law: and, at any rate, he does not include a question of doctrine. Moreover, a disqualified person, as appears by Lancelottus, p. 35, lib. i. tit. 8, might be nevertheless elected by postulation to the pope, who issued a bull, in the manner mentioned in stat. 28 H. 8, c. 20. The next step was the consecration. The rules as to this are given in Lancelottus, p. 48, lib. i. tit. 11, from which it appears that there was no opportunity then for any objector to appear. Finally came the reception of the pall; Lancelottus, p. 45, lib. i. tit. 11. All this, of course, refers to the process antecedently to the statute: but even that was not uniform. In some cases, three names were selected by the sovereign, from which the pope chose one, as in the Gallican Church; and, by an early council of Lateran,^(b) the power of naming bishops was given to Charlemagne. When this rule was moved for, Ferrari's *Bibliotheca Canonica* was also cited, which, vol. ii. 457, tit. *Confirmatio Electionis*, art. 3, ss. 6, 7, 8, 9, 10, gives in effect the same account as that to be found in Lancelottus, adding (s. 8), "con-

(a) Harduin. Concil. tom. vii. p. 9.

(b) In 774. See the note of Mr. Jebb (*Report, &c.* p. 203, (g)), who refers to Mansi's *Concilia*, tom. xii. p. 884, ed. Florence, 1776, and to *Corp. Jur. Canon.* p. 85, *Decret. I. Distinct. 63, c. 22.*

firmationes hisce non observatis factæ ex eodem capite declarantur viribus omninò carere, irritæ et nullæ." This, again, is founded upon the ordinance of the third Council of *Lateran,^(a) which is of no authority in this country. Neither does it appear that the rules laid down in either Lancelottus or Ferrari were ever authorized by the pope. Lancelottus is indeed an authority of little weight, even in the Roman Church, as appears from the account given of his work by Irving, Introduction to the Civil Law, p. 236, (4th ed.) Lancelottus seems to found his statement on the decrees of the second Council of Lyons,^(b) held, A. D. 1274, which are not law in this country. But, at any rate, the language of those writers relates wholly to a state of things antecedent to stat. 25 H. 8, c. 20, and which that statute was intended to alter. Other authorities cited on moving for this rule are inapplicable to a question on the statute. Thus Ayliffe, Parergon, p. 245, says: "In granting confirmation all such persons ought to be first cited who have opposed the election; and these ought to be cited nominatim, if the election was made by part of the electors: but if the election was made unanimously and concorditer, then all such persons ought to be cited in general, who may or will object anything against such election; to appear at a certain day and place, when the confirmation is to be performed, in order to show cause of their disapproving of the election, and to impeach the confirmation thereof. And thus as an election gives a beginning to some church-preferments; so does confirmation add a perfection thereunto." This is true only of such elections as were then canonical, such as those of priests, deacons, deans, canons, &c. But, at p. 118 of Ayliffe, is a chapter on the election of bishops, under stat. 25 H. 8, c. 20, which will be discussed hereafter.^(c) The same explanation applies to *Lyndwood, Provinciale, lib. iii. tit. 21, (p. 218 *k*, ed. 1679), which in effect agrees with the passage cited from Ayliffe. As to the two decretals, upon which Lancelottus's account seems to be founded, the first, which is in the decretals of Gregory IX. lib. i. tit. 6, c. 44 (in the Corp. Jur. Can.), speaks of *prælati* only, which does not include bishops, as the whole passage shows; nor does it make the confirmation void in the event of failure to observe the rules: the second, among the decretals of Sextus, lib. i. tit. 6, c. 47 (also in Corp. Jur. Can.), does avoid the confirmation if the rules be not observed, but does not expressly mention bishops, and, from the context, appears not to include them. Lord HOLT, in *Rex v. Raines*, 1 Ld. Raym. 361, 363, says that "one half of what one finds in Lyndwood is not the law of the land."

Between the passing of stat. 23 H. 8, c. 20, and that of stat. 25 H. 8, c. 20, Cranmer was created Archbishop of Canterbury. The account of this is given in Burnet's Hist. Ref. vol. i. p. 234 (Oxford ed. 1816).

(a) Harduin. Concil. tom. vii. p. 39.

(b) Harduin. Concil. tom. vii. p. 705.

(c) Post, p. 514.

Although, by the former of these statutes, it was not necessary in every case to procure bulls from Rome, eleven were obtained in this instance. The King nominated him: but the Pope, after promoting him, &c., ordered his consecration, sent the pall, and directed the Archbishop of York and the Bishop of London to invest Cranmer with it. No investigation or opposition could have taken place here, the pope being supposed infallible.

There is, however, an express decision that at common law, and notwithstanding the charter of John,^(a) bishoprics were donative. That is the case of *O'Brien v. Knivan*, Cro. Jac. 552,^(b) which came before the *508] Court of King's Bench on error from the Irish Court of King's Bench. The question there arose, whether a bishop, appointed (in the reign of Ed. 6) before the Irish statute 2 Eliz. c. 4, by letters patent without *congé d'élire*, was properly appointed; and it was held that he was; and the Court said: "that the King here, and also in Ireland, before the said statute, might create a bishop by his patent without any writ of *congé d'élire*, which is but a form or ceremony which the kings of this realm have agreed to observe; but if they will not observe this course, it is well enough; wherefore this creation before that statute was good enough."

Then stat. 25 H. 8, c. 20, following immediately the strong assertion of the prerogative of the Crown in stat. 25 H. 8, c. 19(c) recites, in s. 1, the statute of Annates, 23 H. 8, c. 20 (which had provided that no one presented as bishop by the king to the pope should be delayed for want of bulls, or pay for them above a certain sum), and, in sect. 3, though it speaks of election, presentation, investment, and consecration, does not allude to confirmation expressly, evidently treating it as part of the election. Then sect. 4 prescribes the mode. The Crown sends to the dean and chapter a *congé d'élire*, with a letter missive containing the name of the person they are to elect; they are to elect that person, "and none other;" if they do not do so in twelve days, the Crown is to nominate by letters patent. Now, so far, much of the proceeding at canonical elections, as described at Lancelottus,^(d) is superseded. There can be no *coelectus*, since only the person named in the letters missive can be elected; nor *509] any *contradictor*, because the Crown's nomination cannot be disputed, and the dean and chapter are to elect the nominee "with all speed and celerity in due form." The Crown is the sole judge of the fitness of its nominee; there can therefore no longer be any question at the election as to the *persona electi*, except touching his identity.

But the argument on the other side will turn on sect. 5. It is to be contended that, the Archbishop being there directed "to confirm the said

(a) Anté, p. 502.

(b) S. C. Palmer, 22 (Bishop of Ossory's Case); 2 Roll. R. 101. (as *Sobreen v. Kevan*). *Fia. N.* B. 170, note (b), was also referred to.

(c) See the preamble, and sect. 7.

(d) Anté, p. 503.

election," and invest and consecrate, &c., with "benedictions, ceremonies, and other things requisite," the confirmation must still follow the rules laid down for a confirmation which ensued upon the old process of canonical election. Now, in the first case mentioned in sect. 5, where the Crown nominates on default of the dean and chapter, the duty of the archbishop is limited to consecration and investment; confirmation is not mentioned. If the dean and chapter elect the person named in the letters missive within the twelve days, their election is to "stand good and effectual," not if the archbishop, on investigation, and hearing all objectors, chooses to confirm, but "to all intents." Suppose then there issued a peremptory mandamus as here prayed, in case of objection to the person elected, and the archbishop, upon investigation, sustained the objection and refused confirmation, the bishop elected would still remain bishop, but for want of confirmation no one could perform the episcopal duties. The party elected may even excommunicate; Fitz. N. B. 62 N. The election is to be certified to the king: then the person elected takes the title of lord elected of the said dignity: and, after he has made oath and fealty, the king, by letters patent, certifies the election to the archbishop, "requiring and *commanding" him [*510 "to confirm the said election, and to invest and consecrate the said person." Here is the first mention of confirmation; and it is confined to the election, the only direction as to the person being that he is to be consecrated and invested, &c. All that the archbishop is authorized to examine into is the compliance with the statutory directions as to the election, and the identity of the person.

Then sect. 7 makes the dean and chapter liable to *præmunire*, if they do not proceed to election and signify the same "according to the tenor of this act in twenty days;" which they can do only by electing the person named by the Crown. And the same penalty is provided against the archbishop or bishop if he does not confirm, invest, and consecrate within twenty days after signification to him by the letters patent, and against any persons, including by the latter words of the section "every dean and particular person of the chapter, and every archbishop and bishop, and all other persons," who shall "admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act." The election and confirmation, therefore, are mere ceremonies; and the forms which accompany them either are mere matters of routine, continued with the view of retaining an apparent resemblance to the earlier institutions, or ought not to have any place at all in the ceremonial. For it is absurd to suppose that a long investigation can be carried out, when parties delaying for twenty days are made liable to a *præmunire*. Such a construction of the act would justify the phrase which has been applied to

*511] it, of **"The Magna Charta of Tyranny."*(a) The confirmation is now as mere a ministerial act as the allowance of a poor rate by justices. It is not credible that the Legislature in the time of Henry 8, after giving the king full power (by stat. 23 H. 8, c. 20) in the making of bishops, allowing only a time for the pope to consent, should afterwards, when the breach with the pope was complete, have given to a subject the power which was now expressly taken from the pope. The general spirit of the legislature is shown by the statute of the next year, 26 H. 8, c. 1, repealed by stat. 1 & 2 Ph. & M. c. 8, ss. 12, 20, and re-enacted by 1 Eliz. c. 1, s. 17, &c., which asserts the supremacy of the Crown in the strongest terms. The effect of stat. 1 Eliz. c. 1, is thus described in *Caudrey's Case*, 5 Rep. 33 b. "And it was then also established and enacted by the authority of that Parliament, that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual or ecclesiastical, as by any spiritual or ecclesiastical power or authority, had heretofore been, or might lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, should for ever by authority of that Parliament, be united and annexed to the imperial Crown of this realm." Under that statute (s. 18) the High Commission Court was created, which was abolished by stat. 16 C. 1, c. 11.

*512] *That the whole ceremony was understood to be a mere form appears from the recital of stat. 1 Ed. 6, c. 2.(a) "Forasmuch as the elections of archbishops and bishops by the deans and chapters within the King's Majesty's realms of England and Ireland at this present time be as well to the long delay as to the great costs and charges of such persons as the King's Majesty giveth any archbishoprick or bishoprick unto; and whereas the said elections be in very deed no elections but only by a writ of *congé dislier* have colours shadows or pretences of elections, serving nevertheless to no purpose and seeming also derogatory and prejudicial to the King's prerogative Royal, to whom only appertaineth the collation and gift of all archbishopricks and bishopricks and suffragan bishops within His Highness's said realms:" &c. This statute was indeed repealed by 2 stat. 1 Mary, c. 2; but it furnishes a nearly contemporary exposition of stat. 25 H. 8, c. 20. And stat. 1 Eliz. c. 1, which (sects. 3, 7, 10) revived stat. 25 H. 8, c. 20, appears by sect. 2 to have been passed for the repressing of the pope's usurped power, "and the restoring of the rights, jurisdictions, and pre-eminences appertaining to the imperial Crown" of the realm. Further,

(a) This was understood to be an allusion to a passage in a letter addressed by the Bishop of Exeter to Lord John Russell, in which the writer had so characterised the legislative enactment. The letter had reference to the proposed appointment of Dr. Hampden, and appeared about the end of 1847.

(a) This was cited from 1 Burn's Eccl. L. 202, (ed. 9), and 1 Gibs. Cod. 113 (2d ed.). See *Statutes of the Realm*, published by the Commissioners of the Public Records, vol. iv. p. 3.

the Irish statute 2 Eliz. c. 4, which did away with the *congé d'élire*, repeats the recital of stat. 1 Ed. 6, c. 2. It is true that the word used is "elections;" but, canonically, the confirmation was only a part of the election. Confirmation formed no part of the making of suffragan bishops, under stat. 26 H. 8, c. 14. So the power given to the Crown to create bishops by stat. 31 H. 8, c. 9, was to be exercised simply by *letters patent. Neither in Ireland nor in the Isle of Man does [*513 any confirmation now take place.

In Hargrave's note [215] to Co. Lit. 184 a, it is said: "notwithstanding the repeal of the 1 E. 6, the election of bishops is, as that statute emphatically expresses it, mere shadow, colour, and pretence;" and then follows a reference to the *præmunire* clause, stat. 25 H. 8, c. 20, s. 7, and also to the note [105] to Co. Lit. 95 a, where the prerogative of the Crown to appoint to ancient deaneries (a) is treated of, though there be a form of election in that case also. So Blackstone, 1 Com. 379, states that by the statute "the ancient right of nomination was, in effect, restored to the Crown:" and in the note (5) on this passage, in Coleridge's edition, it is said that the five new bishoprics, created by Henry 8, are still purely donative: though in practice the election, &c., to these now takes place in the same way as in the case of the ancient bishoprics. In a note (3), in the same edition, to 4 Com. 108, it is said that the ancient prerogative of the Crown was itself an infringement; that originally the bishoprics were filled by the election of the clergy and laity of the diocese; that the clergy had excluded the laity, and had themselves been excluded by the cathedral and conventual chapters. The origin of the confirmation, according to an earlier passage, 1 Com. 377 (which agrees with the passage before cited from Ayliffe, (b)), was that, the elections having become tumultuous, the sovereigns of Europe "took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities;" * "without which confirmation [*514 and investiture, the elected bishop could neither be consecrated nor receive any secular profits." Blackstone adds: "The right of appointing to bishoprics is said to have been in the Crown of England (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation." But, in its earliest form, the confirmation of the archbishop appears to have been merely a recognition that the election was properly complete; Bingham's *Christian Antiquities*, p. 59, book 2, ch. 16, s. 12, pp. 137, 138; book 4, ch. 2, s. 6, &c. When he ceased to preside in person at the elections, what had been done was certified to him. It was merely the last step completing the election. In Ayliffe, 127, 8, an account is given of the election of

(a) See *Regina v. The Chapter of Exeter*, 12 A. & E. 512.

(b) *Antiq.*, p. 501.

bishops : and his language there differs remarkably from that which he uses in speaking of canonical elections.(a) He refers to the enactment of stat. 25 H. 8, c. 20, as to the election of bishops ; “ which,” he says, “ is done after this manner, viz. The dean and chapter having made their election, must certify it under their common seal to the King,” &c. : “ and then the King gives his royal assent, under the great seal, directed to the archbishop, commanding him to confirm and consecrate the bishop thus elected. And the archbishop subscribes it, viz., *Fiat confirmatio*; and grants a commission to his vicar general, to perform all acts requisite to that purpose. Thereupon the vicar general issues forth a citation to summon all persons who oppose this election, to appear, &c., which citation is affixed by an officer of the Arches on the door of the Bow church, and he makes three proclamations for the

*515] *opposers, &c., to appear ; after the same officer certifies what he has done to the vicar general ; and no person appearing, &c., at the time and place appointed, &c., the proctor for the dean and chapter exhibits the royal assent, and the archbishop’s commission directed to his vicar general, which are both read, and then accepted by him. Afterwards the proctor exhibits his proxy from the dean and chapter, and presents the new elected bishop to the vicar general, returns the citation, and desires that three proclamations may be made for the opposers to appear : which being done, and none appearing, he desires that they may proceed to confirmation *in pœnam contumaciæ*.” Here the non-appearance of opposers is taken for granted ; and the whole is treated as a matter of form. Again, in 1 Gibs. Cod. 109 (ed. 2), where stat. 25 H. 8, c. 20, is set out, there is a note (k) to the words “ letter missive” of sect. 4, in which he says : “ the only choice the electors have, under this restraint, is, whether they will obey the King, or incur a *præmunire* ;” and further, in a note (l) to the words “ in due form” in the same section, he says : “ The election, from beginning to end, proceeds, *seemingly*, upon the *congé d’élire*, without any appearance of restraint from the letters missive, and in the same manner, as if there were no such restraint ; and the only circumstance remarkable in it, is, the solemn declaring of the person elected, to the clergy and people, assembled in the church ; wherein we see the *footsteps* of the more ancient way of electing, and of the part which they had in the election.” He then (note r) gives an account of the confirmation, substantially as in Lancelottus,(b) and notices the citation of opposers “ according to the direction of the ancient

*516] *canon law, where it makes all confirmations void, that are performed, *nullis vocatis, et non discussio negotio*.” Therefore, in order to make this applicable in support of the rule, it must be contended that, in spite of the words of the statute, a confirmation without citation or discussion would be merely void. Then he mentions the calling by name, in the case of a co-elect or an opposer, which cannot occur since

the statute (as before pointed out); then the first schedule; then the summary petition, which is the petition of the proctor "that the bishop elect may be confirmed, upon his alleging and proving the *regularity* of the election, and the *merits* of the person elected: which he does in nine articles." Gibson then sets them out, and adds: "All which articles conclude (tenthly) with a petition, that, in pursuance of the premises, confirmation, &c., may be decreed. Then, the *Summaria Petitio* is admitted, and the Court decrees to proceed *summarie et de plano*, and assign him a term *ad statim* to prove the particular matters contained in the petition; for proof of which, he exhibits the process of the election made by the dean and chapter, the consent of the archbishop, and the royal assent." Thus the process, the consent, and the royal assent prove the regularity and the merits, so far as the Court has power to inquire at all. The proctor who exhibits this proof is the proctor, not of the bishop, but of the dean and chapter, whose election is in the nature of a judicial act, and precludes opposition; for which reason the term assigned is *ad statim*. It may be noticed that, in the case of old deaneries, the commission from the bishop directs the commissioners to examine the election of the person elected, ad "approbandum, ratificandum et confirmandum, ac si opus fuerit ac res ita exegerit, *infirmandum, annullandum, irritandum et cassandum, dictamque electionem ac ipsum electionis negotium, [*517 unà cum suis incidentibus, emergentibus, dependentibus, annexis et connexis quibuscunque discutiendum et decidendum, et finaliter terminandum, prout de jure fuerit faciendum." This form appears in 2 Oughton, *Ordo Judiciorum*, 97, No. 127. The words apparently describe an examination as complete as any that can be found touching the confirmation of a bishop: yet no opposition to the confirmation of a dean takes place.

The case of Parker was mentioned on moving for the rule.(a) He was named for the archbishopric of Canterbury, soon after the accession of Queen Elizabeth. A *congé d'élire* was sent to Canterbury; the chapter met, and referred it to the dean to name whom he pleased: he named Parker; to which the chapter assented. Then a warrant for his consecration was sent to four bishops of certain sees and two other bishops without sees; but some of them refused to act, perhaps, as Strype (b) suggests, because there was no quorum clause. Thereupon a fresh warrant issued, including other bishops. Some of the bishops met under this last warrant; and, as Burnet states, "according to the custom, the *congé d'élire*, with the election, and the royal assent to it, were to be brought before them: and these being read, witnesses were to be cited to prove the election lawfully made; and all who would object to it were also cited." This account is not given by any legal writer, and cannot be

(a) Strype's *Life of Parker*, B. I. ch. 8, pp. 69, &c. Burnet's *Hist. Ref.* vol. ii. pp. 681, 726, 723, &c.

(b) *Life of Parker*, Book II. ch. 1, p. 107.

relied upon : but, supposing it to be accurate, it is manifest that the proceeding was altogether inconsistent with stat. 25 H. 8, c. 20, *there
 *518] not being even a letter missive in the first instance, and the bishops having clearly no power, at consecration, to inquire into the process of election. The practice was, in truth, in a state of transition. It is remarkable that Parker was confirmed by proxy, though he could not be ordained, nor take any of the sacraments of the Roman church, except matrimony, by proxy, as Bishop Bramhall (a) remarks. On a later occasion, in the cases of Bishops Parker and Cartwright, Archbishop Sancroft at first promised to defer consecration until he had examined into certain charges : but, upon hearing that this would subject him to a *præmunire*, he consented to consecrate ; Burnet's History of his Own Time, vol. iii. pp. 137, 8 (Oxford ed.), 1823.

A passage in 1 Burn Ecc. L. p. 207 (ed. 9), was also referred to. Burn gives, from Collier's Ecclesiastical History, vol. ii. p. 745, the account of the confirmation of Bishop Mountague, in the reign of Charles I., from which it appears that a bookseller named Jones attended to object to Mountague, charging him with "Popery, Arminianism, and other heterodoxies, for which his books had been censured in the former Parliament." Dr. Rives, who officiated for the Vicear General, refused to receive the exceptions, because they were not given in writing, signed by an advocate, nor presented by a proctor. This was afterwards inquired into in Parliament ; and Burn adds : "upon which it hath been observed, that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered ; and that the Parliament of that time proceeded upon the same opinion."

This last passage rests on *no apparent authority : and the facts
 *519] themselves show merely that Dr. Rives was willing, in the face of an objection made to a bishop who was violently opposed by a powerful party, (b) to secure himself by insisting only upon a point of form. Neither Gibson, Godolphin, nor Ayliffe refers to the case as a precedent.

On the other hand, in a manuscript work of Sir James Marriott, Queen's Advocate in 1764, and afterwards Judge in the Admiralty Court, entitled Book of Practice, the following passage occurs : "Confirmation must be despatched within twenty days ; otherwise a *præmunire* is incurred. Therefore, there needs no citation of opposers ; nor are they to be heard if they offer. See 25 Hen. 8, c. 20, MS. No. 6, also Eden's Practical Observations." (c)

Reference was also made to Evans v. Ascuthe, Palm. 457. (d) Thorn-

(a) Bramhall's Works, Part I. disc. 5. Consecration of Protestant Bishops vindicated, (vol. iii. p. 43. Oxford ed. 1844.)

(b) As to the character of Dr. Rives, Sir D. Dundas, Solicitor General, referred to Dr. R. Parr's collection of Archbishop Usher's letters, p. 335, (letter 92.)

(c) The Attorney General stated that Marriott's M. S., and probably Eden's Practical Observations, were to be found in the library of Trinity Hall, Cambridge.

(d) S. C. 1 (W.) Jones, 158 ; Latch, 31, 233 ; Noy, 93 ; 2 Rol. R. 450, (as Vaughan v. Ascutel

bury, being Dean of York and Bishop of Limerick, was translated to the bishopric of Bristol. Before he was confirmed, he received a dispensation for retaining the deanery; afterwards he confirmed a lease as dean. The question arose, whether the deanery was gone by the mere election, and so the dispensation void, and his confirmation of the lease invalid. And it was held (a) (the see of Bristol, it should seem, being treated as an ancient bishopric) that by the election only, until confirmation, the bishop had nothing in him, either in the case of translation, or in that of creation; that "the *name is not changed in the case [*520 of creation until consecration; but the name is not changed by confirmation." That refers to the canon law antecedent to stat. 25 H. 8, c. 20, as deducible from Lancelottus: but it cannot refer to the law as altered by the statute; or, if it does so refer, it is an error, as appears clearly from the observation as to the change of name, because, according to the express enactment, the name is now changed at the election. This case appears to be referred to in some remarks on the manner of making a bishop in Salkeld, (b) where, however, no decision is reported.

It will be asked why, if the citation of opposers, and the pronouncing them contumacious in default of appearance, be an unmeaning form, this has been retained. The word "contumacious" is a mere technical term in ecclesiastical law. And it cannot be argued that, wherever forms have been retained, that circumstance proves that they are more than forms. The challenge at the coronation, the calling barristers, when appointed judges by the Crown, to the degree of serjeant, colour in pleading, and many other instances, may be cited, where forms are gone through which can lead to no real question. Historically, it seems probable that, when the Established Church was finally declared independent of the Bishop of Rome, some forms were retained from an unwillingness to abandon the doctrine of apostolical succession. The form, as it is now, appears in Clarke's *Praxis*, tit. cccxxix., p. 427, 2d ed. 1684; the preface to which work is dated 1596. And, for some purposes, an opposition might still be effective, as where the person presented to the *archbishop was not the person in fact elected, or where a pre- [*521 tended election had taken place without the *cong   d'  lire* or letter missive. Hooker (*Ecc. Pd. b. viii. c. 7, s. 3*, (c) after suggesting that the right of the Crown in this respect may be justified on the ground that the Crown originally erected and endowed the episcopal sees, and also because it has the absolute power of creating temporal peers, says: "It is the king's mere grant which placeth, and the bishop's consecration which maketh, bishops," not noticing the confirmation. That prayer is used at the confirmation no more proves that the ceremony is anything but form than it proves that the election, where prayer also is used, is

(a) *Palm.* 474.(b) 3 *Salk.* 72.(c) *Vol. iii. pp. 527, 529. Oxford, 1836.*

other than formal. What reason can be assigned for attributing a substantial effect to confirmation which is not asserted of election or consecration?

Secondly, if the office of the archbishop at confirmation be not, as has just been contended, purely ministerial, but judicial, then no mandamus will go to him. It is not pretended that he has exceeded his jurisdiction, but only that he has not exercised it properly. [Lord DENMAN, C. J. On the other side it is said that a confirmation so made is null, and therefore the archbishop is in the position of a judicial officer refusing to act, as if he had refused to do anything upon the signification of the Crown. Could not the Crown, in such case, compel him by mandamus to act?] No: the remedy is *præmunire*. [COLERIDGE, J. That is only a punishment: many decisions show that a party punishable for not acting may nevertheless be compelled by mandamus *522] to act.] That is so only where a *temporal right is wholly or partly involved, as in the case of a mandamus to grant probate; *Rex v. Raines*, 1 Ld. Raym. 361, S. C. 1 Salk. 299, 3 Salk. 162, Carth. 457, Holt, 310, 12 Mod. 205. Even there, however, this Court will not act if there is already a *lis pendens* in the Ecclesiastical Court; *Rex v. Hay*, 4 Burr. 2295.(a) So mandamus will not go to the Spiritual authorities, commanding them to restore, or direct admission, to an office; *Mr. Leigh's Case*, 3 Mod. 382, *Rex v. The Archbishop of Canterbury*, 8 East, 213. Supposing that the Crown, in order to enforce its prerogative, or the bishop, in order to obtain his temporalities, is entitled to a mandamus, the present applicants are enforcing no temporal right. But even the bishop is not so entitled; *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 539, 544. No mandamus goes to compel the making of a church rate; *Rex v. The Churchwardens of St. Peter's, Thetford*, 5 T. R. 364: but it does go, where, as in the case of some statutable church rates, remedies in the temporal courts have been contemplated.(b) [COLERIDGE, J. Two of the applicants here are incumbents in the diocese of Hereford: the question relates to the appointment of a judge whose decisions might touch their temporalities.] That would be a mandamus *quia timet*, for which there is no authority. It might as well be said that a clergyman in another diocese might apply, lest there should be a translation; or any lay member of the church, or any one paying church rates, or, with reference to the Act of Uniformity (13 & 14 C. 2, *523] c. 4, s. 11), any schoolmaster *in the diocese. [Lord DENMAN, C. J., referred to *Rex v. Parry*, 6 A. & E. 810.] The proper remedy is appeal; to the Privy Council, if this be a Court properly speaking; if they are only Commissioners, to the Dean of the Arches. [COLERIDGE, J. Does any appeal lie by a person not admitted to be a party?] It does, in the Ecclesiastical Courts. The application is as if

(a) See *Rex v. Bettesworth*, cited *ibid*.

(b) *Rex v. The Select Vestrymen of St. Margaret, Leicester*, 8 A. & E. 880.

the Court were asked to interfere by mandamus with Commissioners of the Court of Exchequer in a question of the condemnation of goods, or with an Equity Court upon its refusal to admit particular persons to be parties to a suit before such Court.

Thirdly, the archbishop would be unable to obey the writ, if his proceeding be not that of a Court. How can he inquire into the person, as the inquiry is understood on the other side? The qualifications, which it is said he must ascertain, the *ætas legitima, morum honestas, literatura sufficiens*, as enumerated by Van Espen,^(a) and freedom from defect of ordination or illegitimacy of birth, which Lancelottus^(b) mentions also, might be dispensed with formerly by the pope's bull, upon postulation. But the Crown now stands, as to this, in the place of the pope, and has approved of the person. [COLERIDGE, J. Could the Crown dispense with canonical age, as the pope might?] As to that, there is a statutory restraint; for the preface to the Form and manner of making, &c., bishops, priests, &c., in the Common Prayer book, requires bishops to be thirty years old, and this is confirmed by stats. 2 & 3 Ed. 6, c. 1, s. 1, 5 & 6 Ed. 6, c. 1, s. 8, 1 Eliz. c. 2, s. 2, *8 Eliz. c. 1, 13 & 14 C. 2, c. 4; 1 Burn. Eccl. L. 194, c. (ed. 9). The very objection made to Dr. Hampden assumes the identity of person. As to questions of doctrine or morals, stat. 3 & 4 Vict. c. 86, provides another tribunal, and, by sect. 23, prohibits all Ecclesiastical Courts from inquiring into such matters otherwise than is there provided. [COLERIDGE, J. Is there not a distinction between trying a party, with a view to the inflicting punishment by the judgment, and inquiring into his fitness?] If the trial is to be upon some special charge of unfitness, what can the Court do? The bishop is not the promovent; he is no party in Court till called upon to take the oaths; he has no notice of the charge; the Court cannot summon witnesses, but must make him appear *ad statim* to answer. And, in fact, the proposition of the opponents here was to proceed by articles, which brings the case at once within stat. 3 & 4 Vict. c. 86. The whole charge suggested in the affidavits is vague. When the Roman Catholic religion prevailed in this country, unsoundness of doctrine was criminal, as a heresy, and of course the question could not arise on the confirmation of a bishop: since the Reformation, the discretion is lodged with the Crown. Again, the bishop himself is no party; and the Court will not sanction an inquiry to which the person accused is no party though the judgment, if not appealed against, would be final.

It is remarkable that no authorities show how such an investigation was to be conducted in England, even before stat. 25 H. 8, c. 20. Suppose, in spite of stat. 25 H. 8, c. 19, the canon law applied here. All that appears in *Lynwood, Provinciale*, 217, 218, 219, lib. iii. tit. 21

(a) *Jus. Eccles. Univ. Part I. tit. 14, c. 2, § 5.*

(b) *Inst. Jur. Can. Lib. I. tit. 8, pp. 38, 36.*

*525] (which was cited on the motion), is a gloss *on a constitution of Archbishop Peccham of the date of about 1279. Much of this gloss is founded on the opinion of Joannes Andreas, which, however, says Lyndwood (p. 219 k): "Non observatur, ut communiter in Anglia." But the constitution refers to presentations, not to the case of bishops, the words are "exceptis personis episcoporum, quorum hæc ordinatione auctoritas non arctatur." But Lyndwood, in his gloss (p. 217 e), qualifies this by adding the words "secundum intentionem statuentis," and refers, as to the authority of bishops, to 218 k, where he declares that he had consulted certain "doctores," who, among other "conclusiones," lay down "quòd in negotio electionis, de quâ hic loquitur, non sufficit sola citatio eorum quorum interest, sed opus est discussione negotii: alioquin non valet confirmatio." *Discussio* is not argument, but such examination of a question as the case requires. But this passage relates, not to the confirmation of a bishop, but to "confirmatio etiam per episcopum facta." With respect to the Constitution of Othobon, commented on by John De Athon (Lyndwood's Prov. Append. p. 133), the passage under the title "De Confirmatione Episcoporum" does not appear to relate to questions of doctrine. After reciting the importance of providing that the *persona*, to be placed in the pastoral seat, "nullis (quantum humanitùs possibile est) sit maculis denigrata," the constitutio goes on to enact: "ut cum electionis episcopalis confirmatio postulatur, inter cætera super quibus inquisitio et examinatio procedere debet, secundum canonum instituta, illud exactissimè inquiretur, utrum plura beneficia cum animarum curâ, qui electus est, antequam eligeretur, habuerit; et *526] si habuisse inveniatur, an cum eo super hoc fuerit *dispensatum, et an dispensatio, si quam exhibuerit, vera sit et ad omnia beneficia, quæ obtinuit, extendatur." What the "cætera" are does not appear, unless it can be collected from the gloss(a) of John De Athon, who says: "præcedunt enim in confirmatione plura inquirenda, s. tam de meritis electi quam eligentium. Item tam de materiâ quam de formâ." Here is nothing as to doctrine. The account given in 1 Gibs. Cod. 111, note r, is quite inconsistent with the nature of a real inquiry into doctrine. The other authorities cited show only the foreign mode of proceeding. And a gloss on Lancellotus,(a) to the words "munus ei confirmationis impendat," which occur in the passage before cited,(b) is given in some editions (as Leyden 1584); "hodie hæc confirmatio non est necessaria. Papa enim sibi reservat potestatem super omnibus dignitatibus: solet tamen de gratiâ electos confirmare." And Van Espen (Jur. Ecc. Un. part. i. tit. 14, c. 2, s. 8) says that the rite of confirmation varied "pro temporum et locorum diversitate."

The Vicar General has in fact no contentious jurisdiction enabling him to decide a question of this kind. In 1 Oughton's Ordo Judiciorum,

(a) Lib. I. tit. 9, p. 40. See post, p. 533, note (a).

(b) Antè, p. 503.

Phillegomena, xvi., c. 8, s. 9, it is stated that formerly two distinct offices, that of Auditor causarum negotiorumque Audientie Cantuariensis, and of Chancellor to the Archbishop, were united in one person. And (sect. 10): "qui Cancellarius (sive Vicarius in spiritualibus Generalis) ea quæ contentiosæ jurisdictionis erant non exercebat, id est causarum inter partes, in foro contradictorio, decisionem (*præterquam, quæ pro formâ solummodo ventilantur; utpote, negotia confirmationis episcoporum *electionis, et similia*) sed ea, quæ sunt officii meri, gerebat." At [*527 sect. 11 he says: "Nullus autem, a plurimis abhinc(a) retroactis annis, extitit Audientie Judex." In 4 Inst. 337, Coke gives an account of the Court of Audience. He says: "this Court is kept by the archbishop in his palace, and meddleth not with any matter between party and party of contentious jurisdiction." But, as appears from Clarke's *Praxis*, p. 2, *Procem.*, the Court of Audience was held in St. Paul's cathedral; and it had a concurrent jurisdiction with that of the Dean of the Arches; Clarke's *Praxis*, tit. iv. p. 6; Oughton, tit. v. ss. 8, 9. It is clear, therefore, that Coke is confounding the two offices of Judge of the Court of Audience and Vicar General, they being held by one person, and that his remark applies to the latter. A similar view of the office of Vicar General, even in the consistory Court, appears to have been taken by Lord STOWELL in *Thorpe v. Mansall*, 1 Hag. Cons. Rep. 4 (note). The only other officer of the Archbishop who sat in this commission was the Master of the Faculties, who also has no contentious jurisdiction. If the charge here were made by articles, as proposed, the case, as before shown, would be within stat. 3 & 4 Vict. c. 86, ss. 7, 23: if by libel, it does not appear how the attendance of witnesses is to be enforced: a signification of contempt in such a case would raise a question of great difficulty, if not of actual danger to the judge; *Beaurain v. Scott*, 8 Campb. 388. Nor does it appear how answers could be enforced from the parties. If the bishop elect were proceeded against criminally under stat. 3 & 4 *Vict. c. 86, he would be protected [*528 by sect. 20 from charges touching any offence committed more than two years back. By the present application it is sought to do that indirectly which the statute prevents from being done directly.

Fourthly, the ordinary rules which govern the proceeding by mandamus are opposed to this application. In the first place, the confirmation has taken place, and is complete. The archbishop is *functus officio*. It is not suggested that the confirmation should be brought up to this Court and quashed: yet that, according to analogy, must be done before the mandamus can go. Thus, in the case of a *melius inquirendum* to the coroner, before the writ goes to disinter the body the first finding must be quashed. So in the case of the finding of an *escheator*. In the second place, independently of the question as to interfering in a judicial proceeding, man-

(a) The year of the publication of Oughton's first volume appears from the titlepage to be 1724.

damus generally will not go, unless there be a temporal right; *Rex v. St. Peter's, Thetford*, 5 T. R. 364; *Regina v. The Select Vestrymen of St. Margaret, Leicester*, 8 A. & E. 809, before referred to. Here the question is on a point of canon law. It was urged that the canon law is a part of the common law: but it is altogether a distinct branch, and one which this Court must treat as foreign law, and can know only from evidence. In the third place, even taking the proceeding as one in a common law Court, mandamus does not go merely because, upon the view which such a Court takes of the law, it considers an objection valid against proceeding further; *Regina v. The Justices of Kesteven*, 3 Q. B. 810, where this court overruled former decisions, and particularly *529] *Regina v. The Justices of Carnarvonshire*, 2 Q. B. 325, and *Regina v. The Justices of the West Riding*, 2 Q. B. 331. In the matter of *Pratt*, 7 A. & E. 27, is a very strong case of refusing a mandamus where justices have rejected evidence which ought to have been admitted; to which may be added (as analogous) *Ex parte The Overseers of Tollerton*, 3 Q. B. 792, and *Regina v. The Justices of Buckinghamshire*, 3 Q. B. 800. *Rex v. The Justices of Kent*, 14 East, 395, cited on moving for this rule, was a case where the justices had refused to enter into the case at all: here the question of the right to be heard has been entertained and decided upon. The objection to interference applies much more strongly where the question is one of practice in the Ecclesiastical Courts; *Ex parte Smyth*, 3 A. & E. 719, 784.(a) And on that ground the Court, in the *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 539, 544, refused, not only a prohibition to prevent the Delegates from proceeding to affirm a sentence of deprivation against a bishop, but also, which makes the case very like this, a mandamus commanding them to admit the bishop's allegations. In the fourth place, the mere circumstance that the archbishop, if he act wrongly, will be liable to præmunire under stat. 25 H. 8, c. 20, s. 7, if he unduly delay the confirmation, is sufficient to prevent the mandamus from going. Before stat. 6 & 7 Vict. c. 67, s. 3, this would have been so even if a peremptory mandamus issued: and the Court will not now create a delay *530] which, if there be no peremptory mandamus, will *subject the Archbishop to a præmunire. A præmunire is not confined to offences by dealing with Rome; Com. Dig. *Præmunire* (B), 3 Inst. 120, 123, *Rex v. Cawood*, 2 Ld. Raym. 1361, S. C. 1 Str. 472. Lastly, as no good end will be answered by this mandamus, but the result would be vexatious strife, on this and future occasions, the Court will, in its discretion, refuse the writ; *Rex v. The Commissioners of Excise*, 2 T. R. 381, 385; *Rex v. The Paddington Vestry*, 9 B. & C. 456; *Rex v. The Justices of Lancashire*, 12 East, 366, 370; *Rex v. The Justices of Buckinghamshire*, 1 B. & C. 485; *Rex v. The Bishop of Chester*, 1 T. R. 396, 403; 15 Vin. Ab. 204, tit. *Mandamus* (H. 3), pl. 8, ib. 216 (Z.).

(a) And see *Ex parte Smyth*, 2 C. M. & R. 748 S. C. 17rwh & G. 222.

Sir Fitzroy Kelly, Dr. Addams, A. J. Stephens, Peacock, and Badley, contra.

First, the office of the archbishop, in confirmation, is not merely ministerial, but is judicial also.

Before the establishment of the regular canon law, the appointment of bishops was in the people and clergy jointly, the metropolitan having, however, the power to judge of the fitness: afterwards the people were excluded from a share in the appointment, which then rested with the diocesan clergy only, and was subsequently confined to the clergy of the bishop's cathedral. The history of this appears in Thomassinus, *Vetus et Nova Ecclesiæ Disciplina*, vol. v. part ii. lib. 2, cc. 1, 2, 8, &c. (ed. 1787); De Marca, *De Concordiâ Sacerdotii et Imperii*, lib. 8, c. 8; Bingham's *Ecclesiastical Antiquities*, Book 4, c. 2. Afterwards, and antecedently to stat. 25 H. 8, c. 20, the nomination was undoubtedly, *to all practical purposes, in the Crown. But the fallacy of the [*581 argument founded upon this fact lies in confounding the placing of bishops with the making of them: it is to the placing only that the power of the Crown extended; but the Crown could not, properly speaking, make a bishop: and to inquire into the fitness of the nominee of the Crown for the office of bishop is no more an invasion of the prerogative of the Crown than it is to inquire into the fitness of a person nominated to a Crown living for the office of priest.

That, in the time of the Apostles, the character of the persons who were to be bishops was matter of strict inquiry appears fully from the language of St. Paul, in 1 Ep. Tim. iii. 2 & seq., and Ep. Tit. i. 5 & seq.

In the 123d Novel of Justinian, c. ii. it is said: "*Si quis autem electum ad ordinationem episcopatus accusaverit in quâlibet causâ quæ possit secundum leges aut canones ejus impedire ordinationem, differatur hujusmodi ordinatio: et prius contra eum propositam causam sive præsentem accusatore, et ab eo propositam causam exequente, sive etiam deficiente per tres menses suam accusationem implere: diligenter examinari ab illo a quo futurus erat episcopus ordinari: et si quidem obnoxium eum accusator invenerit, prohibeatur ordinatio.*" This indicates that the office of consecration was judicial before the existence of what now forms the canon law.

The Apostolical Constitutions are of high authority, as a collection, made probably about the beginning of the third century, of the then existing canons. (a) The 33d canon (b) of these, speaking of bishops, recognises the office of Primate, "*qui in eis est primus.*" The fourth canon of the Council of Nice (c) (which, being *among the first [*582 four general councils, is recognised in stat. 1 Eliz. c. 1, s. 36) attributes the power of confirming the bishop to the archbishop; the

(a) See *Regina v. St. Giles in the Fields*, antè, 173, 206.

(b) *Harduin. Conc. tom. i. p. 18.*

(c) *Ib. p. 324, A. D. 325.*

6th(a) declares "episcopum esse non oportere" "si quis præter sententiam metropolitani fuerit factus episcopus." The same or stronger language will be found in the 19th canon of the Council of Antioch,(b) the 12th canon of the Council of Laodicea,(c) the 12th canon of the second Council of Carthage,(d) the first canon of the fourth Council of Carthage,(e) the 25th canon of the Council of Chalcedon,(g) the 5th Canon of the Council of Arles,(h) and the 26th canon of the fourth Council of Lateran.(i) These regulations are adopted into the Corpus Juris Canonici, decret. i. dist. xxiii. 2, ib. dist. lxiv. 8, ib. dist. lxxv. 2, ib. dist. lxxv. 5, Sexti decretal., l. I. tit. vi. 44, 47.

The writers on the canon law invariably take the same view. In Dupin, *De Antiquâ Ecclesiæ Disciplinâ*, Diss. 1, c. xii p. 62, there is a reference to the councils; and, after the election of the bishop has been described, it is said to have been laid down that the election should be confirmed "ab episcopis provinciæ, præsertim verò a metropolitano." In Fleury's *Institution au Droit Ecclésiastique*, part. i. ch. 10 (Opuscules, tom. ii. p. 205), the process of calling opposers is described, and then he says, the metropolitan "procède au jugement;" and adds: "Ce jugement consiste à examiner les qualités de l'élu et la forme de l'élection: *533] *et s'il y a des contradicteurs, le procès peut être fort long. Il peut y avoir grand nombre d'opposans; et chacun peut avancer autant de causes de nullité, qu'il peut y avoir d'irrégularités et d'incapacités en la personne de l'élu, et de chacun des électeurs; et qu'il y a de défauts de formalités dans l'élection." The same result is to be deduced from Barbosa, *Jus Ecclesiasticum Universum*, lib. i. cap. 9, s. 8, p. 140 (ed. Lugd. 1560). And in Martene, *De Antiquis Ecclesiæ Ritibus*, vol. ii. p. 26, et seq. (ed. Venet. 1783), lib. 1, c. 8, art. 8, the practice of examination fully appears. These authorities show the practice of the Western Church.

With respect to Lancelottus, Irving, upon whom reliance is placed on the other side, says of him (Introduction, &c., p. 236, ed. 4): "the only favour which the author could obtain was that his Institutions might be added to the Corpus, but without any confirmation of their authority:" and he states that the work was undertaken with the approbation of Paul 4, but could obtain no express sanction from Pius 4, beyond what has been mentioned. This furnishes at least fair evidence of what was then the general understanding. A passage on the subject has been read, in the argument on the other side, from Lancelottus, lib. i. tit. 9: and these words follow the words "assumantur animarum:(k) "Quod

(a) Harduin. Conc. tom. i. p. 326.

(c) Ib. p. 783, A. D. 372.

(e) Ib. p. 978, A. D. 398.

(h) Harduin. Conc. tom. ii. p. 773, A. D. 457

(k) Antè, p. 504. Dr. Addams, in argument, referred to the gloss and heading of the title of

(b) Ib. p. 602, A. D. 341.

(d) Ib. p. 54, A. D. 390.

(g) Harduin. Conc. tom. ii. p. 611, A. D. 451.

(i) Harduin. Concil. tom. vii. p. 39, A. D. 1215.

Lancelottus here cited in the text: but, it appearing, upon comparison, that these were not the same in the different editions, he declined to press that part of his argument, and confined himself to the text.

sum in cunctis sacris ordinibus sibi locum vindicet: in episcopo tamen multò fortius, qui ad curam aliorum positus in seipso debet ostendere, quomodo cæteros in domo Dei oporteat conversari." P. 40. [*534
 *Stress has been laid on the fact that Lancelottus says (gloss, *d*, on "impendat," p. 40), that in the case of bishops "hodie hæc confirmatio non est necessaria." The reason is that he, being a Perugian, referred to the bishoprics where the pope nominated and consecrated: there, of course, a confirmation by the pope himself was unnecessary. The exception rather proves the rule. It is therefore erroneous to suppose that the rules laid down are inapplicable to the case of a bishop. Lancelottus says, in the passage cited, that "indignè promovens puniendus" erit. That is not necessarily the Crown, even assuming that the party electing is pointed at; a subject might promote to a bishopric, as in the case of the bishopric of Sodor and Man; for in point of fact the appointment to that bishopric was subject to confirmation, as appears from Strype's *Life of Archbishop Grindal*, p. 260, B. 2, ch. 2. The truth, however, is that the party to be punished is the metropolitan; for the passage in Lancelottus is taken from the 26th canon of the fourth Council of Lateran,^(a) where the party designated is undoubtedly the person confirming.

As to the authority of the canon law in this country, Blackstone, in the *Introduction to the Commentaries*, s. 3, p. 82, after stating that the canon law consists of certain pontifical collections, and legatine and provincial constitutions, refers to stat. 25 H. 8, c. 9, s. 2, as enacting that a review of the canon law should be had, and that, in the mean time, all canons, &c., not repugnant to the law of the land or the prerogative of the Crown should (s. 7) still be used and executed. No such review has yet taken place. The *Reformatio Legum*, published by the Commissioners under stat. 3 & 4 Ed. 6, *c. 11, has never become law.^(b) [*535
 The applicability of the canon law, therefore, now rests on the statute first mentioned, and may be inferred from precedents. But that the common law courts do notice the law of the Church is stated in 6 Vin. Abr. p. 496, tit. *Court* (D), pl. 1, 2, 4; and this was strongly put in argument in *Regina v. Millis*, 10 Cl. & Fin. 534. [Lord DENMAN, C. J. But there (p. 680), TINDAL, C. J., speaking in the name of the twelve Judges, and referring to Coke and Hale, said that the canon law is not the law of England, except it has been approved and adopted in this country.] At any rate, whenever it appears that any portion of the canon law was received throughout the rest of Europe at the time of the Reformation, the burthen of disproof is thrown upon those who deny that it has become the law of England. And, in fact, Lyndwood, John de Athon, and other English canonists, do state as law the provisions of the general canon law or this subject. It was argued, on the

(a) Harduin. Concil. tom. vii. p. 39.

(b) See *Goelling v. Voley*, 12 Q. B. 328, 371.

other side, that Lyndwood's Commentary (Provinciale, 218, lib. iii. tit. 21), on the constitution of Archbishop Peccham, has no reference to bishops. The constitution itself has none; but Lyndwood's gloss is not so confined; and, in the Tabula prefixed to the Provinciale, confirmation is mentioned generally with reference to the gloss in Lyndw. 218. In John de Athon's notes to a constitution of Otho, *De Officio Archiepiscoporum et Episcoporum*, p. 55,(a) and on a constitution of Othobon, *De Confirmatione Episcoporum*, p. 183,(a) the canonical rules as to the qualifications of a bishop and the examination into them are recognised.

The English practice clearly agreed with this. In Wharton's *Anglia* *586] *Sacra*, vol. i. p. 315, it is mentioned *that, in and before November, 1280, the Archbishop of Canterbury rejected, on account of the canonical disqualification of plurality, two persons who had been successively elected bishops of Winchester, and that the last election having been referred to the pope, was quashed. In the same volume, p. 348, is an instance of an election of a bishop, confirmed by the archbishop "*præmissâ legitimâ examinatione super electione*;" at p. 357, of a confirmation of a bishop stopped by the pope; at p. 417 of a confirmation of an election by an Archbishop of Canterbury in the reign of Henry V., there being three anti-popes; at p. 531, of confirmation refused by the Archbishop, though the election was assented to by the Crown, A. D. 1302; at p. 631, of a bishop being enthroned after canonically purging himself of a charge of being party to the murder of Thomas A'Beckett; at p. 637, of an election quashed by the King and the Archbishop, in 1256, but confirmed by the Pope on appeal; at p. 640, of an examination by the Archbishop, touching the *persona electi*, and the election quashed, on account of "*minûs sufficientem literaturam*," on which followed an appeal to Rome, which succeeded; the effect of which, the historian remarks, was that the archbishop had thenceforward the power "*cassare*," but not "*conferre*," the election. Numerous instances of the regular judicial exercise of confirmation are to be found in the History of the Church of Durham in the same book, particularly at pp. 719, 735, 736, 755.

The pope, by provisions or appeals, or some other means, certainly acquired much of the jurisdiction in matters of confirmation. An instance appears in the case of Bishop Stapylton,(b) who was elected, *587] and *whose election was contested; there was an appeal to the Pope, who remitted to the Archbishop to inquire and confirm in England. This power is recognised in Yearb. Mich., 41 Ed. 3, pl. 13, fol. 5 B, 6 A. By an act or ordinance made in 3 H. 5, after reciting that confirmations had been made by the metropolitans during the long voidance of the Apostolic see, it was enacted that persons elected and to be elected during such voidance should be confirmed by the metropo-

(a) Append. to Lyndwood.

(b) *Badeley* stated this case from the Register Books at Exeter.

litans; Rot. Parl. vol. iv. p. 71. The form of the writ, ordering the confirmation in pursuance of this act, is in Rymer's *Fœdera*, vol. iv. part 2, p. 156 (ed. Hag. 1740): it contains the words "absque excusatione seu dilatione aliquâ;" yet there is no pretext for saying that the right of examination did not then exist. No reason can be assigned for putting a different construction on stat. 25 H. 8, c. 20. The writ (a) under the statute which revives it, 1 Eliz. c. 1, has no stronger words than those cited from the writ under stat. 3 H. 5. The writs in the times of James 1 and Charles 1 (given in Rymer's *Fœdera*, vol. vii. part 2, p. 73, and vol. viii. part 2, p. 205,) are much like the present writs; in a writ in 1538 (vol. vi. part 3, p. 18), the words are "cum omni celeritate accommodâ confirmetis." But all, in some form or other, recognise the pastoral office of the primate. The state of the papal and metropolitan authority, as existing jointly, is described by Barbosa, *Jus Ecclesiasticum Universum*, lib. i. c. 9, pp. 139, 140. In *all [*538 cases, however, the confirmation included the popular right of having objections heard and tried.

The case of Cranmer appears to have been a compromise. He was elected by *congé d'élire*, but confirmed by the Pope. That was shortly before stat. 25 H. 8, c. 20. There are instances of confirmations, with strict examinations, by Cranmer himself, as in the case of the Bishop of Ely in 1534, the Bishop of Salisbury in 1535, and others; and similar and earlier instances in the time of Archbishop Chicheley. (b) In the case of Cardinal Pole there was also a *congé d'élire*; and there was a canonical confirmation and consecration by virtue of bulls from Rome, according to Burnet, *Hist. Ref.* vol. ii. part 2, B. 2, p. 614 (ed. Oxford, 1816). Parker was the first Protestant archbishop after the re-establishment of the reformed religion in this country. An account of the proceedings in his case is given in Burnet, *Hist. Reform.*, vol. ii. p. 681, 720; in Strype's *Life of Parker*, book 1, ch. 8; and in Bishop Bramhall's works (vol. iii. p. 173, in the Library of Anglo-Catholic Theology). In the last the proceedings are fully set out. (c) And there, although no one appeared to object on the proclamation for opposers, yet, on the eighth article of the summary petition, (d) a witness of the name of Baker, (e)

(a) The writ in the case of the confirmation of Archbishop Parker (set out by Mr. Jebb, Report, pp. 58, 59, note) has not the words "absque excusatione seu dilatione aliquâ;" nor was there anything equivalent in the letters patent to the Archbishop, in the present case, or in the commission of the Archbishop. (Jebb, pp. 23, 22, note.)

(b) For this *Badeley* referred to the Registry of the see of Canterbury.

(c) They will be found, taken from the Lambeth Register, in Mr. Jebb's Report, p. 56, note (g), from which the extracts in the three following notes are here made. The Register is also copied in Bramhall.

(d) "Item; quod præfatus magister Mathæus Parker, fuit et est vir providus et discretus, literarum sacrarum eminente scientiâ, vitâ et moribus meritò commendatus, liber, et de legitimo matrimonio procreatus, atque in ætate legitimâ et in ordine sacerdotali constitutus, necnon Deo devotus, et ecclesiæ memoratæ apprime necessarius, ac dictæ domine nostræ Reginæ, regnoquæ suo et reipublicæ fidelis et utilis." Jebb, p. 64, note.

(e) "Super libello sive summariâ petitione," &c. Johannes Baker generosus, moram trahens

*539] and another of the *name of Tolwyn,(a) deposed to the personal fitness of the archbishop elect, as to birth, morals, knowledge, &c. [ERLE, J. Was that after stat. 1 Eliz. c. 1, had revived stat. 25 H. 8, c. 20?] Yes. It is material to remark that the confirmation and consecration of Parker were not completed within the twenty days prescribed by the statute.(b) At the confirmation of Whitgift, as appears from Strype's Life of Archbishop Whitgift, p. 223, Book iii. c. 1, the commissioners confirmed "sitting judicially, et pro tribunali." The case of Bishop Mountague has been commented upon on the other side: but it is at least clear that Dr. Rives did not profess to have refused to hear the objectors on the ground that it would subject him to a *præmunire*.

*540] *Godwin, in his work *De Præsulibus Angliæ* (p. 443, ed. 1748), intimates that the opposers appeared at Bow Church, to accuse Mountague as "*Arminianismi nescio cujus reum*," and as "*adeò Pontificiis faventem*;" but that, it appearing that they produced "*calumnias potius quam argumenta*," "*subsecuta est aliquandiu impedita confirmatio, et consecratio*." [ERLE, J. It would appear then that Godwin was misinformed, since the charge was not entertained at all.] The only importance of the passage is that it shows Godwin not to have heard of the risk of *præmunire*. The probability is that some inquiry took place, not at the confirmation, but afterwards. The history of the event is given more at length in Heylin's Life of Archbishop Laud, p. 175. Bishop Fell, writing in 1669, states, in a note (c) on the Epistle of St. Clement, that in England, after the election, "*plebis assensus demùm expectatur*," and, describing the citation of opposers, says that "*nemine comparente (quod tamen non semper evenit)*," they are pronounced contumacious: that, without citation, opposers are not barred by the sentence; "*ita ut populi, etiam quantumvis laici, non solum approbationem requiri, sed etiam oppositionem (si qua subest causa) attendi, imò et judicialiter solucitari, ex lege constat*." In the supplement to Nichols's Commentary

in præsentī cum venerabili et eximio viro Magistro Matthæo Parker electo Cantuariensi, xxxix annorum ætatis, oriundus in parochiâ Sancti Clementis in civitate Norwici, liberæ, ut dicit, conditionis, et testis de et super libello prædicto productus, juratus, et examinatus, dicit ut sequitur. Ad primum," &c., "refert se ad processum," &c. "Ad octavum; dicit" (sic) "in vim juramenti sui deponit quòd idem reverendissimus pater Matthæus Parker fuit et est vir providus, ac sacram literarum scientiâ, vitâ et moribus commendatus, ac homo liber et ex legitimo matrimonio procreatus, atque in ætate legitimâ et in ordine sacerdotali constitutus, et dictæ Domine nostræ Regine fidelis subditus; reddendo causam scientiæ suæ in hæc parte dicit, quòd est frater naturalis dicti Domini Electi; suntque ex unis parentibus procreati et geniti." Jebb, p. 72, note.

(a) Willielmus Tolwyn Artium Magister, ac Rector Ecclesiæ Sancti Antonini in civitate London, lxx annorum ætatis, ut dicit, liberæ conditionis, etc. Testis, etc. Ad primum," &c. (as before). "Ad octavum; dicit et deponit contenta in hujusmodi articulo esse vera, de ejus certâ scientiâ, quia dicit quòd benè eum novit per hos xxx annos, ac per idem tempus secum admodum familiaris fuit, et in præsentī est; et etiam dicit, quòd novit ejus matrem." Jebb, 72, note.

(b) A question arose, during the argument, whether in Parker's case there was, besides the congé d'élire, any naming of the person to be appointed: see Strype's Life of Parker, B. 2, ch. 1, and Burnet, Hist. Ref. vol. iii. p. 720 & seq.

(c) Badeley stated that the date of this note was 1669. The reporters have not been able to obtain this edition; but the note will be found in the Oxford edition of 1677, on p. 93 of Clement's first epistle to the Corinthians.

on the Book of Common Prayer, p. 46 (dated 1711), the author insists on the canonical nature of the confirmation, and says that confirmation and consecration take place "when the validity of the election, and sufficiency of the person are by public acts and due proceedings *judicially approved." At the late confirmation of Dr. Lee as Bishop of Manchester, (a) an opponent appeared; but his exceptions were not received because they were not signed by an advocate: the commissioners, however, did state that the exceptions could not have been entertained at all, for that they, the commissioners, were obliged to confirm under penalty of a *præmunire*. It is known that Dr. Clarke was not elected to a bishopric because his confirmation and consecration would have been opposed. (b) In the case of Dr. Rundle, who, in 1733, was recommended by Lord Chancellor Talbot to the bishopric of Gloucester, Venn, the rector of St. Antholin's in that city, entered a caveat against the confirmation, and this with the sanction of Gibson, then bishop of London. (c) The consequence was that Dr. Rundle was not elected, but was made Bishop of Derry in Ireland. If the caveat was rightly entered, Venn would have been entitled to be cited by name at the confirmation. [*541]

The reason that many modern instances of opposition are not found is that, till recently, the Crown nominated, not so much by the intervention of the prime minister, as by personal choice. It appears from Cardwell's *Documentary Annals of the Reformed Church of England*, vol. 2, pp. 299, 353, that Charles the Second, in 1681, and William the Third, in 1700, appointed by commission bishops and others to examine into the fitness of persons for any preferment in the church.

*Thus it seems that the election, both before and after stat. 25 H. 8, c. 20, was of no effect till consummate by confirmation, including in that the examination into the fitness of the person appointed. And this is strengthened by the circumstance, mentioned on the other side, that, even in the case of the new bishoprics created under stat. 31 H. 8, c. 9, the same form of proceeding has long been used, though the words might undoubtedly appear to give the power simply to the Crown: it is probable that the metropolitans felt a difficulty in consecrating persons whose fitness had not been ascertained, which could be done only by the examination at the time of confirmation, in the case of bishops, though it is otherwise in the case of the consecration of priests and deacons. The effect of stat. 25 H. 8, c. 20, appears to have been to make that which was previously the understood law a matter of direct enactment: it gave to the Crown the power of placing the bishop: but it may be doubted whether, if the dean and chapter chose not to elect [*542]

(a) Dr. Addams, having been counsel for the Bishop on that occasion, stated these circumstances from his own knowledge.

(b) *The Royalty of the Crown in Episcopal Promotions*, &c., 2d ed. 1847.

(c) *The Royalty of the Crown*, &c., pp. 42, 46; Preface to Bishop Rundle's *Letters*, p. xlvii & seq.

the person named, they would be liable to the *præmunire*. Certainly Gibson (1 Cod. 109, note *k*), as cited on the other side, asserts that they would: but here, at all events, the *congé d'élire* (*a*) simply grants leave to elect "such a person for your bishop and pastor, as may be devoted to God, and useful and faithful to us and our kingdom:" and the letters missive merely profess to "name and recommend" the person, and "require" the dean and chapter, on receipt of the letters, "to proceed to *543] your *election, according to the laws of this our realm, and our *congé d'élire* herewith sent unto you, and the same election so made to certify unto us, under your common seal." If they do not elect at all, within twelve days, then, by the plain words of sect. 4, the Crown may nominate: but, supposing they had elected a party not named, if the Crown had issued its letters patent directing the confirmation of that election, the party elected would, by confirmation and consecration, have become the bishop. The letters missive came in by degrees: in Leslie's Case of the Regale, (*b*) the case of Foliot is mentioned, who was recommended by King John to the bishopric of St. David's, but rejected, and was afterwards chosen Bishop of Hereford without recommendation: and Leslie points out that the *congé d'élire* was anciently framed as a request rather than a command.

The argument on the other side attributes to the Crown the power of making as well as of placing a bishop, and does not stop short of substituting the Sovereign for the Pope. That would, to a great extent, undo the work of the Reformation. In Caudrey's Case, 5 Rep. 1 *a*, (*c*) it is said that the intention of the statutes of Henry 8 and Elizabeth was to restore the ancient prerogative of the Crown and the ancient right of the Church. According to Hooker (Ecc. P. B. 8, c. 7, s. 1, vol. 3, p. 524), "if we speak properly, we cannot say kings do make, but that they only do place, bishops. For in a bishop there are these *544] three things to be considered; the power whereby he is *distinct from other pastors; the special portion of the clergy and people over whom he is to exercise that bishoply power; and the place of his seat or throne, together with the profits, pre-eminences, honours thereunto belonging. The first every bishop hath by consecration." Now consecration must necessarily be preceded by something which gives the metropolitan power to examine into the fitness; and this can be only confirmation. [Lord DENMAN, C. J. By the form of consecration, the archbishop is to examine and try: yet the form gives only particular questions, prescribing the answers: "Are you persuaded" so and so? "I am so persuaded."] That is all. But in the case of the ordination of deacons and priests it is otherwise: the archdeacon is

(*a*) The *congé d'élire* and the letters missive, in the present case, were not set out in the affidavits: but they were referred to, by consent: and it was assumed that they were in the accustomed form. See 2 Gibson's Codex, 1327 (ed. 2). Jebb, 3, 4.

(*b*) Theological Works (ed. 1832), v. l. iii. p. 359. See The Royalty of the Crown, &c., p. 34.

(*c*) See ib. 18 *a*, and the remarks in the margin at 12 *a*, 23 *a*, *b*, 28 *a*, 30 *b*, 31 *a*, 32 *b*.

charged as to the meetness of the persons to exercise the ministry; and he states that he has examined them and thinks them meet: and then follows a *si quis*, that is, a call upon the congregation present to state any known impediment. But there is no such opportunity at the time of consecration. The collect, epistle (which is from 1 Tim. c. 3), and gospel are read; the Nicene Creed and the sermon: then two bishops present the bishop elect; the mandate for the consecration is read: the oaths of supremacy and of obedience to the Archbishop are administered; the litany follows: and then the Archbishop, reciting the command not to be hasty in laying on hands, puts the questions, and the answers are given. In all this there is nothing which can be called a trial. Yet, according to Hooker (Ecc. P., B. 8, c. 7, s. 2, p. 525), "with consecration the king intermeddeth not further than only by his letters to present such an elect bishop as shall be consecrated. Seeing therefore that none but bishops *do consecrate, it followeth that none but they [*545 only do give unto every bishop his being." It follows that confirmation, the only ceremony where examination can be introduced, must be an essential part of consecration. It has been suggested that the king might, as the pope formerly did, dispense with some qualifications. Want of fit age, however, it is admitted that he cannot dispense with; indeed in the Common Prayer book, though it is said "none shall be admitted a deacon, except he be twenty-three years of age, unless he have a faculty" (i. e. a dispensation from the archbishop, to whom the power of dispensation is given by stat. 28 H. 8, c. 16, ss. 5, 6), (a) the age of twenty-four for a priest and thirty for a bishop is prescribed without any such reservation. A power therefore must reside in the bishop, at some step, to decline acting where a party is not qualified. It should seem, therefore, that confirmation is more properly part of consecration than of election. [ERLE, J. What is confirmed?] The election; but the judicial part of confirmation is rather a precedent step to consecration. [ERLE, J. But, if the act be judicial, the result may be to annul instead of confirming: what is to be annulled?] The election, certainly: but that has the effect of stopping the consecration. [COLERIDGE, J. When does the bishop get the temporalities?] After consecration. [COLERIDGE, J. Then would a mandamus lie, to direct consecration?] There is no ground for supposing that it would. (Waddington. Sect. 6 of stat. 25 H. 8, c. 20, gives the restitution of the temporalities after consecration. But the *præmunire* would deprive the *archbishop of his see, if he did not consecrate; which seems to [*546 be the remedy.)

In the *Tortura Torti* of Bishop Andrewes, p. 380 (ed. 1609), (b) it is said that "*Sub primatûs nomine Papatum novum Rex non invehit in ecclesiam;*" and that the King does not assume the power "*vel personas*

(a) Repealed by stat. 1 & 2 Ph. & M. c. 8, ss. 16, 20; revived by stat. 1 Ellis. c. 1, s. 10.

(b) See *The Royalty of the Crown*, &c., p. 6.

sacrandi, vel res," nor any powers "quæ ad sacerdotale munus spectant, seu potestatem ordinis consequuntur." Stillingfleet, in his treatise On Ecclesiastical Jurisdiction (Second Part of Ecclesiastical Cases), p. 95, &c., in order "to clear the notion of supremacy, as it hath been owned and received in the church of England," refers to the explanation given in stat. 5 Eliz. c. 1, s. 14, and the 37th Article, and concludes, in accordance with Bishop Andrewes, by denying that the supremacy gives the power of ecclesiastical censures. In Mason's *Vindiciæ Ecclesiæ Anglicanæ* (Lib. 3, c. 7, p. 328, 2d ed.), (a) a Roman Catholic priest is introduced as imputing to the English church that her bishops are Queen's bishops and Parliament bishops, and that Queen Elizabeth was a woman pope: and the answer, supposed to be given by the defender of the Establishment, rests entirely on the citation at the time of confirmation, which is adduced to show that our kings "id duntaxat quod regum est, episcopi quod episcoporum est faciunt." Field, On the Church, B. 5, p. 680 (Oxford, 1635), (b) says: "touching things naturally and merely spiritual: the power in these is of two sorts: of order and of jurisdiction." In *547] the former he includes the authority "to ordain *ministers;" and this power, he says, "the princes of the world have not at all," "but it is proper to the ministers of the church." As to jurisdiction, he says: "yet do we not" "make our princes with their civil states, supreme in the power of commanding in matters concerning God, and his faith and religion, without seeking the direction of their clergy," "nor with them, so as to command what they think fit, without advising with others, partakers of like precious faith with them, when a more general meeting for farther deliberation may be had, or the thing requireth it." It is thus considered not sufficient even that the clergy should concur with the Sovereign in jurisdiction purely spiritual: the participation of the general body of persons professing the same faith must be secured: and this is done, at confirmation, by a real opportunity being afforded to objectors. The ancient right of the people to approve or disapprove of the choice of bishops is asserted in Archbishop Potter's Discourse on Church Government, ch. 5 (pp. 417, et seq. ed. 1753); and he refers to what are called the Apostolical constitutions; citing also the sixth canon of the council of Nice to show that the consent of the metropolitan and com-provincial bishops was requisite to the ordination of a bishop.

The word "confirmation" has, like the Latin word "confirmatio," a forensic sense; it means, establishing a thing by proof. Stat. 25 H. 8, c. 20, was not intended to alter the practice in this respect. Its main object was to put an end to the interference of the Pope. That appears by the title as given in the Statutes of the Realm. (c) In *Hinton v.*

(a) See Lindsay's Translation, *The Royalty of the Crown*, &c., p. 15.

(b) Cited in argument from *The Royalty of the Crown*, &c., p. 12.

(c) See ante, p. 498, note (c).

Dibbin, 2 Q. B. 646, 663, Lord *DENMAN, C. J., points out the expediency of considering the title of a statute in putting a construction on it. [Lord DENMAN, C. J. In modern times, the title is the act of the legislature: it does not appear to have been so anciently.] The preamble is, at all events, important; and here the preamble consists of references to statutory restraints on the power of the Pope. The first three sections mention the Pope expressly: the fourth carries out the third: the fifth requires the archbishop to confirm and consecrate without bulls from Rome. The sixth must be read in connexion with the fifth. It has been pointed out, on the other side, that, in the case of nomination and presentation by the Crown, in default of election by the dean and chapter, there follows, by sect. 5, only consecration. That is easily explainable if confirmation has reference especially to election; for in this case there is no election: but it does not follow that, even there, the metropolitan must consecrate without reference to the fitness of the party presented. Sect. 5 provides next for the case of election. It enacts that the election of the dean and chapter "shall stand good and effectual to all intents." But this must be understood, as appears from *Evans v. Ascuithe*, Palm. 457, 472,(a) as giving final validity to the election when consummated by confirmation with consecration following, it being till then only inchoate. If a bishop elected were to join the Roman church, to become insane, &c., between the election and the confirmation, he surely would not continue bishop for life, nor could the metropolitan incur a præmunire for not confirming or consecrating. If the bishop elect were at *consecration to make answers opposite to those prescribed for him in the service, the archbishop could not proceed: he surely would not then incur the præmunire. Indeed, as the present form of consecration is more modern than stat. 25 H. 8, c. 20, it is probable that the archbishop had at the time of the statute a larger power than now of examining at consecration. The archbishop, by the statute, is to confirm and consecrate without any bulls, &c., from Rome: but nothing appears destroying the judicial character of the confirmation itself. Then the penalty of præmunire is imposed, by sect. 7, if the metropolitan "shall *refuse, and* do not confirm, invest, and consecrate" in twenty days, or shall allow any let to the "due" (*i. e.* the formal and regular) "execution of this act," where the "let" clearly refers to matters ejusdem generis with those before specified by the words "admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary;" which clearly refers to interference by the Roman church, or other foreign authority claiming spiritual jurisdiction in this realm. It is to the act of maintaining the papal power that the penalties of præmunire specially apply. [COLERIDGE, J. Have you looked for entries in cases of præmunire?]

(a) S. C. 1 (W.) Jones, 158; Latch, 31, 233; Noy, 93; 2 Roll. Rep. 450 (as *Vaughan v. Ascue*).
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There is a reference, in 6 Bac. Abr. 379 (ed. 7), tit. *Præmunire* (A), and the note there, to a case in which a question arose as to præmunire under stat. 28 H. 8, c. 16, against pleading bulls from Rome. (The *Attorney General* referred to *Rex v. Cawood*, 2 Ld. Raym. 1861, S. C. 1 Str. 472, under stat. 6 G. 1, c. 18, s. 19 (the Bubble Act), and to the old *Natura Brevium*, 158 b: the *Solicitor General* *mentioned *550] *Lalor's Case*, 2 How. St. Tr. 533.) In *Com. Dig. Præmunire* (C), there is a reference to an Anonymous (a) case in *Dyer*, as to the form of the indictment under stats. 1 Eliz. c. 1, ss. 27, 29, and 13 Eliz. c. 2, s. 4. [COLERIDGE, J. I suppose Not guilty lets in the whole defence.] That must be so. That the exact words of a statute are not always sufficient in an indictment on such statute appears from *Fletcher v. Calthrop*, 6 Q. B. 880, and *Rex v. Corden*, 4 Burr. 2279. An indictment, therefore, simply charging the archbishop with not having confirmed and consecrated within the given time, would not be enough: the want of lawful excuse must be averred. In 1 Hal. P. C., c. 10, p. 75, and c. 25, p. 328, &c., the statutes 1 Eliz. c. 1, and 5 Eliz. c. 1, are spoken of as directed against the see of Rome; and, among the cases of *præmunire*, a refusal to confirm is not mentioned. It may be observed here that the statute 25 H. 8, c. 20, was repealed by stat. 1 & 2 Ph. & M. c. 8, ss. 9, 11, and revived by stat. 1 Eliz. c. 1, ss. 7, 10: but that the last, by sect. 32, provides that no "clause, matter, or sentence" of stat. 1 & 2 Ph. & M. c. 8, shall be repealed which "doth in anywise touch or concern any matter or cause of præmunire, or that doth make or ordain any matter or cause to be within the case of præmunire; but that the same, for so much only as toucheth or concerneth any case, or matter of præmunire, shall stand and remain in such force and effect, as the same was before the making of this act; anything in this act contained to the contrary in anywise notwithstanding." It seems therefore that the præmunire clause continues repealed. In Lord Bacon's "Preparation toward the union of the laws of *England and Scot- *551] land," (a) under the title "offences of præmunire," stat. 25 H. 8, c. 20, is referred to; and he clearly looks upon the whole as a provision against adhering to Rome, specifying only the refusal of the dean and chapter to elect, not that of the archbishop to confirm and consecrate. [COLERIDGE, J. How can you distinguish the two cases?] They do indeed appear in the same section; that perhaps escaped Lord Bacon's notice. [COLERIDGE, J. If there be no distinction, his authority is against you.] He probably considered that the offence of the archbishop pointed at was a refusal to consecrate without bulls, &c., from Rome, connecting the words of sect. 7, "with all due circumstance as is aforesaid," with sect. 5. The history of the statute, which was notoriously passed as a step of hostility to Rome, in consequence of the Pope's

(a) 3 *Dyer*, 363 a.(b) Vol. v. p. 99 (*Montagu's* ed. 1826).

conduct in the matter of Henry the Eighth's divorce, confirms this view. Henry could have no object in restraining the power of the then Archbishop, Cranmer, who might be depended upon as a ready instrument of the will of the Crown. Indeed the refusal to confirm would be much like the repeal of letters patent on the ground that the Crown has been deceived in its grant; which is, not an invasion, but a carrying out of the prerogative. Supposing that a controversy had existed as to the right of nominations to benefices, and a statute had passed declaring the right to be, not in the lay patrons, but in the Crown: still the regular form of ordination, examination, &c., would remain in the bishop. So the statute here, by giving to the Crown the absolute appointment to the bishoprics, in no way superseded that spiritual jurisdiction which always existed, wherever the appointment was.

*A statute in the affirmative, without any negative expressed or implied, does not take away the common law, and therefore [*552 "does not affect any prescriptions or customs clashing with it, which were before allowed;" Dwarria, On Statutes, p. 478, 4, 2d ed. (citing 2 Inst. 200, and Co. Lit. 111 b, 115 a). "If a statute make use of a word, the meaning of which is well known, and has a certain definite sense at the common law, the word shall be expounded" in that sense; ib. p. 565. "The words of a statute are to be taken in their ordinary and familiar signification," "and regard is to be had to their general and popular use;" ib. p. 578. In *Stradling v. Morgan*, Plowd. 199, 207, it was held that a statute taking away the authority of a Court is to be construed strictly. A statute in the affirmative does not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as "and not otherwise, or in no other manner;" *Caudrey's Case*, 5 Rep. 5 b. It cannot be said that stat. 25 H. 8, c. 20, s. 5, by commanding absolutely the performance of a judicial duty, has rendered it merely ministerial. The sentence in this case (a) states that the Commissioners have "heard, seen, understood, and discussed the merits and circumstances of a certain business of confirmation:" it gives a "definitive sentence or final decree," states that the commissioners "have amply found, and do find," among other matters, that the Bishop elect is "a man both prudent and discreet, deservedly laudable for his life and conversation," &c., "and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed." By this sentence, the Bishop becomes *an ecclesiastical judge, [*553 and, before stat. 10 & 11 Vict. c. 108, would have become immediately an ecclesiastical peer. A sentence so given must be presumed by the judges of the Common Law to be according to the Ecclesiastical Law; 17 Vin. Abr. 280, *Prerogative of the King* (O. e). And that the judicial character still continues appears from the language in *Salkeld* under the title *Bishop*; (b) also from *Godolphin's Repertorium*, p. 26

(a) See ante, p. 494.

(b) ? *Salk.* 73, pl. 5.

(2d ed.), and Gibson's Codex, p. 114 (2d ed.), where it is said that "election is an incomplete act, which may be vacated many ways; as," "by proofs of legal incapacity at the time of confirmation." Now causes of deprivation are good causes for refusing a presentee to a benefice; *Specot's Case*, 5 Rep. 57 *a*, 58 *a*, *Watson's Clergyman's Law*, c. 20, p. 215, (4th ed.); and the archbishop, where he has a visitatorial power (as he has over bishops), has power of deprivation; *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 539, 541: the principle therefore extends to a refusal of confirmation. It is pointed out in 1 Gibson's Codex, 114, that stat. 25 H. 8, c. 20, which gives the Crown a power to act where the dean and chapter will not elect, gives no such power if the archbishop refuses to confirm and consecrate. The inference is that a larger discretion was left in him.

The general rules referred to, as to the construction of statutes, are here the more material, because the rights of the church have been frequently recognised by the Legislature; as in the statutes of *Magne Charta*, 9 H. 3, c. 1, 1 stat. 14 Ed. 3, c. 1, 50 Ed. 3, c. 1, various statutes of Richard the Second, (a) stat. 4 H. 4, *c. 3, (b) and 1 stat. *554] 1 W. & M. c. 6, s. 3, where the coronation oath is express. There is another rule for the construction of statutes, namely, that those which take away popular or the common law rights are to be construed strictly; 7 Bac. Abr. 461 (ed. 7), tit. *Statute* (1) 4; 19 Vin. Abr. 516, tit. *Statute* (E. 6), pl. 49, 50; *Bedell v. Constable*, Vaughan, 177, 179; *Fludier v. Lombe*, Ca. K. B. temp. Hard. 307. Now, as has been shown, the people in early times took a large share in the election of bishops. But the construction contended for on the other side absolutely removes the last hold which the people have on the election, that of objecting to the fitness. [COLERIDGE, J. You say the people's right to elect did not impede the metropolitan's right of confirmation; and you admit that the right of election is gone.] That would not destroy the ancient right of objecting at the time of confirmation. And it is obvious that many objections to the fitness of a bishop may exist which can be investigated only upon charges brought forward by those who may happen to be informed of them from their individual habits, such as residence in the neighbourhood, and the like.

Stat. 1 Ed. 6, c. 2, is supposed to show that the confirmation is merely formal: but all that is there said is that the elections (not the confirmations) "be in very deed no elections, but only by a writ of *congéd'éure*, have colours, shadows, or pretences of elections." That certainly describes the present mode of election; but it does not touch the question as to confirmation.

Long disuse does not destroy the jurisdiction of a Court, if it has once

(a) Anno 1, c. 1; ann. 2, stat. 2, c. 1; ann. 5, stat. 1, c. 1; ann. 6, stat. 1, c. 1; ann. 7, c. 1; ann. 8, c. 1; ann. 12, c. 1; ann. 21, c. 1.

(b) Also, ann. 1, c. 1; ann. 2, c. 1; ann. 4, c. 1; ann. 7, c. 1; ann. 9, c. 1; ann. 13, c. 1.

had a legal existence. Courts *leet, courts of chivalry, and, till recently, the sheriff's county court, fell into disuse; yet legally [*555 they still existed: so did wager of battle and wager of law, till put an end to by statute. The action of account still subsists in law, though rarely resorted to. Supposed forms are often, in reality, the evidence of the continued substantial existence of the right. Here, especially, where the ceremony is characterized by all the features of a solemn religious act, the supposition that the whole is a pretence is least admissible.

It has been pointed out that in the Irish church there is no confirmation. That this is not an example to be followed might perhaps appear from the history of the promotions to Irish bishoprics; the case of Rundle(a) is one instance. It is not true that in fact the appointment to the bishopric of Sodor and Man is not confirmed, as is shown by Strype's *Life of Archbishop Grindal*, B. 2, ch. 2, p. 260. [*The Attorney-General*. There is now no confirmation in the case of that bishopric.]

Secondly, it is contended, on the other side, that, if this be a judicial proceeding, the remedy is by appeal, not by mandamus. But the affidavit shows that the objectors were not allowed to appear: they are therefore not admitted as parties to the proceeding, and cannot appeal. For this reason *The Bishop of St. David's v. Lucy*, 1 *Ld. Raym.* 544, is inapplicable.

The parties applying for this writ have clearly a sufficient interest. Two of the three are clergymen within the diocese over which the bishop elect would preside. Any one of them, if appointed to a fresh *benefice within the diocese, would undergo an examination by [*556 the bishop, and must be interested in the question whether the party who may have to examine will require a conformity to opinions which are not those of the Established Church.

Thirdly, the archbishop has the means of trying this question. It was stated, on the other side, that it appeared from Oughton's *Ordo Judiciorum, Prolegomena*, vol. i. p. xvi., that the Vicar General has no contentious jurisdiction. The passage cited appears, at first sight, to be contradictory, as stating that there is no contentious jurisdiction except in the case of bishops' confirmations, yet implying that these are not contentious. The meaning, however, seems to be that the Vicar General has no contentious jurisdiction except in cases which are ordinarily not contentious but may become so, excluding therefore cases where there are litigant parties in the ordinary sense. But in *Parker's case*(b) the form is that of a Court with contentious jurisdiction; for the opponents are cited to appear on a given day, "cum continuatione et prorogatione dierum extunc sequentium et locorum si oporteat," &c. The Commissioners

(a) See *antè*, p. 541.

(b) *Bramhall's Works*, vol. iii. p. 184. Also, *Jebb's Report*, p. 62, note.

here might have referred the hearing to the Archbishop in the Court of Audience, which still exists, though not used for some time. This is manifest from the language of Oughton (vol. i. Prol. p. xvi.), "*Nullus autem, a plurimis abhinc retroactis annis, extitit Audientiae Judex; utpote, forensis; Hæc, itaque, Curia Audientiae Cantuarensis omnino jamdudum exolevit: nisi quatenus ipse (nonnunquam) *Archiepiscopus, in arduis (utputa, deponendis episcopis, aut similibus) audentiam suam celebrat, in propria personâ, et proprio in palatio, cum auditore speciali, sive auditoribus, ad hoc, specialiter constitutis, pro istâ vice, unâ secum assidentibus.*" The question, whether a person elected bishop has written in derogation of the Book of Common Prayer and the Thirty-Nine Articles, may surely be classed among the "*ardua.*" The last instance of the Court sitting appears to have been in the case of Bishop of St. David's v. Lucy, 1 Ld. Raym. 477, where HOLT, C. J., recognised the authority of the Court. It seems to be treated as a superior Ecclesiastical Court in 4 Inst. 337, and Com. Dig. *Courts* (N 4): in Ayliffe's Parergon, 192, it is said to be of equal jurisdiction with the Court of Arches, though of inferior dignity and antiquity: and it is referred to in stat. 23 H. 8, c. 9, s. 1, as one of the "*high Courts of the Archbishops of this realm.*"

A difficulty has been suggested as to the power of summoning witnesses. But, if the Court of Audience has jurisdiction to try this question, such a power would be incident to the jurisdiction. That was the ground on which Lord LYNTHURST in *Dicas v. Lord Brougham*, 6 C. & P. 249, S. C. 1 Moo. & R. 309, held that the Lord Chancellor might commit in bankruptcy proceedings. Nor is it necessary to lay down the precise mode of inquiry. The Archbishop must act upon such evidence as satisfies his own conscience. The case is somewhat analogous to the inquiry which this Court institutes into the conduct of an attorney, with a view to the question whether he *should remain on the roll. *558] The case *Re King*, 8 Q. B. 129, affords an instance of the latitude of inquiry, not limited to strictly legal offences, which the Court there exercises.

It has been asked, how the inquiry can be brought to an end so as to enable the metropolitan to confirm and consecrate within the twenty days. But the præmunire could not attach if the confirmation were proceeded upon in due time, and unfinished only because it was impeded by a regular inquiry incidental to the process of confirmation. Any reasonable impediment, such as illness of the party elected, would be an answer. This is illustrated by the statute respecting suffragan bishops, 26 H. 8, c. 14, the 5th section of which provides that the archbishop shall perform the effects of the act within three months of his receiving the letters patent, "*having no lawful impediment.*" Archbishop Parker, as has been pointed out, was not confirmed within the twenty days.

The Church Discipline Act, 3 & 4 Vict. c. 86, does not apply to the

present question. [Lord DENMAN, C. J. On that point we need not trouble you: the writ is not asked for here by way of punishment.]

Fourthly, it is said that the ordinary rules by which this Court acts in granting or refusing the writ of mandamus are against this application. The case of *Bishop of St. David's v. Lucy*, 1 *Ld. Raym.* 444, has been cited. But there the mandamus was refused because the Bishop being already a party in the cause, it was for the spiritual Court to determine whether his allegations were admissible or not. The Court had acted and decided. But here the Court refuses to act at all; and the *complaint is, not that they have determined the question [*559 wrongly, but that they have refused to entertain it. That in such a case a mandamus is granted, appears from many authorities; among which may be mentioned, *Rex v. The Justices of Middlesex*, 4 *B. & Ald.* 298, 300; *Regina v. The Justices of the West Riding of Yorkshire*, 10 *A. & E.* 685, 687; *Rex v. The Justices of Kent*, 14 *East*, 895; *Regina v. Magistrates of Gort*, 1 *Jebb & Symes*, 888; *Rex v. The Surrey Justices*, 2 *Showers*, 74. The general principles upon which, in modern times, a mandamus is granted to compel the performance of public duties generally are explained in *Rex v. The Mayor of Fowey*, 2 *B. & C.* 584, 596, 8, and the view there taken agrees with what is to be found in earlier cases, as *Bagg's Case*, 11 *Rep.* 93 *b*, 98 *a*; *Rex v. Baker*, 3 *Burr*, 1265, 1267; *Rex v. The Bishop of Lincoln*, 2 *T. R.* 388, *note*; *Rex v. The Bishop of Ely*, 5 *T. R.* 475; the last two being instances of a mandamus being considered a proper remedy where a visiter refused to exercise his visitatorial power. In *Rex v. Raines*, 1 *Ld. Raym.* 861, it was held that a mandamus could go to compel the ordinary to grant probate; though a decision by the ordinary as to the will could be questioned only in the Ecclesiastical Courts. To the like effect are *Com. Dig. Prærogative* (D 9), 2 *Roll. Abr.* 224, tit. *Prærogative Le Roy* (L), *Bayly v. Boorne*, 1 *Str.* 392; 15 *Vin. Abr.* 203, tit. *Mandamus* (H. 8). *Ex parte Smyth*, 3 *A. & E.* 719, and *Regina v. The Justices of Kesteven*, 3 *Q. B.* 810, are inapplicable: there courts of competent jurisdiction had heard and decided. The Courts of Westminster Hall go so far as *to interfere by prohibition where an inferior tribunal decides [*560 wrongly upon a statute; *Gould v. Gapper*, 5 *East*, 345. The principle would apply to a mandamus, if, as is contended, there has been a wrong construction put on stat. 25 *H. 8*, c. 20.

The argument, that a mandamus ought not to go if there be a risk that the party by obeying it will incur a penalty, was disregarded in *Rex v. Everet*, *Ca. K. B. temp. Hard.* 261.

Unless the arguments on the other side be sufficient to remove all doubt, the mandamus ought to issue, in order that the question may be formally brought before the Court by a return; *Regina v. Heathcote*, 10 *Mod.* 48, 58. And now, by stat. 3 & 7 *Vict. c. 67*, s. 2, the party

against whom judgment may be given on the return can have a writ of error.

Sir *J. Jervis*, Attorney General, in reply.(a) The last argument is inapplicable to a case where it is sought to interfere with the ordinary course of proceeding, and where the effect of a rule will be to delay that which, according to the statute, ought to be executed within a limited time. This objection is the stronger *in a case where delay will *561] produce a prolongation of an internal contest in the church.

It is said that the application no more interferes with the prerogative of the Crown than an examination of a party presented to a Crown living. But such a presentation is founded on patronage, and is unconnected with the prerogative: whereas the appointment of bishops is intrusted by the Legislature to the Crown, as head of the state, and is thereby made a part of the Royal prerogative.

As to the interest of the applicants, the argument on the other side is, that they are entitled to take precautions against the confirmation of a person holding unsound doctrines. Now, if this application succeed, the Archbishop or his Vicar General will have to decide the question of soundness of doctrine. What security is there that, on matters involving nice distinctions of doctrine, a different test may not be applied in the province of Canterbury and that of York? Or that the doctrine held sound in Ireland, where, as is admitted, the check on the prerogative now called for cannot be applied, may not differ both from that of Canterbury and from that of York? These dangers are obviated, as they were meant to be, by the supremacy which the Legislature has lodged in the Crown in all the three cases. Suppose the Archbishop to hear the case, and to decide it; the appeal then lies to the Privy Council, composed principally of laymen.

By stat. 28 H. 8, c. 20, s. 2, if any person presented by the Crown was delayed for lack of bulls, &c., he was to be consecrated and invested, "in like manner" as "in ancient time;" that is, by the king's delivery *562] of the ring and staff. That statute was not a positive *enactment; negotiations with the Pope were then going on. But stat. 25 H. 8, c. 20, recites, in sect. 3, the former statute, and makes it positive. The intention, therefore, was to give to the Crown its full ancient power.

It has been argued that sect. 32 of stat. 1 Eliz. c. 1, preserves the repeal of stat. 25 H. 8, c. 20, by stat. 1 & 2 Ph. & M. c. 8, so far as

(a) The right of reply was disputed, but insisted upon on the ground that the Crown was, as the Attorney-General certified, interested in respect of its prerogative. The Court expressed a doubt, but decided that it would be convenient to hear the Attorney-General. He was heard accordingly, but declined withdrawing his claim of the right. Reference was made to *Rowe v. Brenton*, 3 Man. & R. 133, 304, S. C. 8 B. & C. 737, stat. 14 E. 3, c. 16; Attorney-General v. Lord Churchill, 8 M. & W. 111; Doe dem. *Legh v. Roe*, 8 M. & W. 579 (see note (a), p. 583); Lord Douglas v. Officers of State, 9 Cl. & F. 173, 199; O'Connell v. The Queen, 11 Cl. & F. 185, 182, 230; *Drake v. The Attorney-General*, 10 Cl. & F. 257, 271; *Leonard Watson's Case*, 9 A. & E. 731, 803.

regards the *præmunire* clause in sect. 7 of stat. 25 H. 8, c. 20. But sect. 32 of stat. 1 Eliz. c. 1, refers, not to sect. 7 of stat. 25 H. 8, c. 20, but to sect. 40 of stat. 1 & 2 Ph. & M. c. 8, which renders all persons disturbing the late distribution of property that had formerly been ecclesiastical liable to *præmunire*; the legislature not having thought it safe, when this country was reconciled to the Roman Church, to take the property which had belonged to the monasteries from the laymen who had become holders; and the legislature, in the time of Elizabeth, having thought it fit to continue this protection. The passage cited from Lord Bacon, if it confines the *præmunire* to the dean and chapter, is wrong upon any view: if there be no *præmunire* in the case of the archbishop there is none in that of the dean and chapter.

The solemnity of the form of confirmation is insisted upon. Yet the election is not less in form a solemn religious act: and it is not pretended that there the choice is more than formal. All the objections made upon the supposition that the bishop might, in the interval between-election and confirmation, have renounced his faith, or committed a crime, or become mentally incapable, are equally applicable to the interval between the sending the letters missive and **congé d'élire* and the act of election. It is asked, what is to be done if the bishop will not, at consecration, answer the questions put to him in the prescribed form. In that case, the ceremony cannot proceed, and there is no let or impediment on the part of the metropolitan. If he does answer as prescribed, the metropolitan, whatever his private knowledge be, must perform the ceremony. That is not a greater difficulty than exists in the admitted case of the election. The very difficulty, as to elections, is supposed, in Mason's *Vindiciæ Ecclesiæ Anglicanæ*, lib. iv. c. 18, p. 500,(a) to be urged by an objector: and the only answer suggested is, that, if it be shown on petition that an appointment is improper, the Crown may reconsider the case.

As to the argument urged from the ceremony of consecration, it is to be observed that the form of consecration was prescribed in the time of Edward 6, at which time, by stat. 1 Ed. 6, c. 2, there was no confirmation at all.

The case of Archbishop Parker can supply no precedent; for it is evident on the proceedings that they were not in pursuance of stat. 25 H. 8, c. 20.

The position of the Crown, as to bishoprics, may be illustrated by the ancient law as to benefices in Scotland; and the remarks of Lord Brougham in *Presbytery of Auchterarder v. Earl of Kinnoul*, 6 Cl. & Fin. 646, 693, have a strong bearing on the present case.

Cur. adv. vult.

In this vacation (February 1st), there being a *division of opi- [*564

(a) See also *The Royalty of the Crown*, &c., p. 17.

nion upon the Bench, the learned Judges delivered their judgments seriatim.

ERLE, J. A rule for a mandamus to the Archbishop of Canterbury, to hear and decide on the objections of the applicants to the confirmation of the election of Dr. Hampden to the Bishopric of Hereford, upon the ground of the unsoundness of some theological opinions published by him, has been moved for.

In support of the application, it has been contended that the Archbishop, when confirming the election of a bishop in obedience to stat. 22 H. 8, c. 20, is bound to try judicially the validity of the election; and that persons present at the time of confirming have a right to state to him their objections to the person elected, and to demand his judgment thereon; and that this right may be enforced by mandamus in case of a refusal to hear. To this it has been answered, that the provisions of the statute are in direct contradiction to the right contended for. The question, therefore, turns upon the effect of the statute.

The preamble of the third section recites that the manner and fashion of electing, presenting, investing, and consecrating bishops had not been plainly and certainly expressed in stat. 23 H. 8, c. 20, and for remedy enacts, by sect. 4, that the dean and chapter shall elect the person named in the letters missive of the King, within twelve days; and, in case of their default, that the King may nominate and present to the archbishop such person as the King shall think able and convenient for the vacant bishopric. And, by sect. 5, first, that, in case of such nomination and presentment, the archbishop shall with all speed invest and *con-
*565] secrate without any recourse to Rome; and, secondly, that, in case the dean and chapter shall elect the person named in the letters missive, their election shall stand good and effectual to all intents, and the person so elected, after certification to the King, shall be reputed and taken by the name of lord elected of the bishopric. Then, the oath and fealty appointed for the same being made to the King by the person so elected, the King shall signify the said election to the archbishop, commanding and requiring him to confirm the said election, and to invest and consecrate the person so elected. And, by sect. 7, if any archbishop, after any such election or nomination shall be signified, shall refuse and do not confirm and consecrate the person so elected or nominated within twenty days, or if any person shall admit any process to the contrary of the due execution of this act, such person shall incur the penalties of a præmunire.

Upon this review, it appears to me that the power of nominating to a vacant bishopric is given to the King, and that the archbishop has no authority to judge whether the King has properly exercised that power.

If, for default of election, the King nominates to the archbishop, the archbishop is made liable to a penalty if he refuses and does not consecrate within twenty days: and in this case it was not contended that he

is empowered to sit in judgment upon the propriety of the King's nomination. If, upon any sufficient grounds within his knowledge, he should remonstrate against the command, it is not easy to suppose that the penal law would be resorted to against him: still if it were necessary to decide the right, the King, in my judgment, is here made supreme; and the duty of *consecration is imposed on the archbishop, [*566 whether he approves of the person presented or not.

In case of an election by the dean and chapter of the person named in the letter missive, the King is to command the archbishop to confirm the election. And this brings us to the point of contention between the parties: whether this command to confirm operates according to the usual meaning of those words, or as a command to try the validity of the election in respect of the regularity of the proceedings and the qualifications of the elected, and to adjudge whether it shall be confirmed or annulled.

According to the general rule, the words of a statute should be construed in their ordinary sense, so as to give effect to all its parts. Now, in the ordinary sense of the words, a command to confirm an election does not involve an authority to annul it.

If the other parts of the statute are regarded, it is provided that the election by the dean and chapter of the King's nominee shall be good and effectual to all intents; and the clause relating to the command to confirm immediately follows. Confirming, in its ordinary sense, is consistent with this provision: but it is a contradiction in terms to say that an election may be good and effectual, to all intents, that is absolute and conclusive, and at the same time voidable and inconclusive. The enactment, that the person elected shall be reputed and taken by the name of the lord elected, is consistent with a power to adjudge him disqualified: and it is very notable that he is to make oath and fealty for the office before even the command for confirmation issues. The enactment prohibiting the archbishop from refusing and omitting to confirm *and consecrate for twenty days, and from admitting any process to the let of the due execution of the statute, is inconsistent with the supposed duty to invite and receive objections, and to decide whether he will confirm or refuse.

If analogy be consulted, no reason can be suggested why the nomination of the King by letters patent should be absolute, and the nomination of the King by letters missive to the dean and chapter should be subject to review. The statute, therefore, if construed by ordinary rules, does not operate to impose on the archbishop the duty, or to give to the applicants the right, alleged.

But it is contended that the confirming of the election of a bishop by the metropolitan has a technical sense, to be found in the canon law, and expresses an examination by him into its validity, both as regards the proceedings of the election and the qualification of the elected; that

this power of the metropolitan was exercised from the earliest times of Christianity throughout the Christian world, and had accordingly prevailed in England down to the time of Henry 8; and that, therefore, the legislature intended it should have this technical sense in the statute in question. In support of these views, many passages from writers on the canon law and from historians were adduced. Also the form of citing all opposers to appear and state their objections, which has been in use upon confirmations at least from the time of Queen Elizabeth, was much relied on; and the advantage of giving to the archbishop this power of inquiry, and to the people this power of objecting to the bishop elect, was mentioned.

*568] But these grounds are, in my judgment, untenable. *In the first place, the reception of evidence of extrinsic facts, for the purpose of affecting the construction of a statute thereby and altering the received meaning of known words, is dangerous, if not illegal. But, supposing the evidence to be receivable, the assertion that any such usage of confirmation by the archbishop prevailed in England down to the time of the passing of the statute, does not appear to me to be proved. The preamble brings before us stat. 23 Hen. 8, c. 20, from which it is to be gathered that nomination and presentation by the King to the pope was the course then for the making of bishops, and that inconvenience had arisen from exactions and delay by the pope; and therefore provision is made for the King to nominate and present to the archbishop, and for the archbishop to consecrate the bishop so nominated, in case of delay by the pope; and the course thus provided is described to be "according and in like manner as divers other archbishops and bishops have been heretofore, in ancient time, by sundry the King's most noble progenitors, made, consecrated, and invested within this realm." The making and consecrating of a bishop is mentioned several times in this preamble; but confirming is not mentioned; nor is there a sign in the statute that confirmation by the archbishop was then in use in England. The preamble asserts the former practice of the kings of England to nominate for consecration. The reference to history leads me to the conclusion that bishoprics were donatives of the King under the Saxon and some Norman kings; that, from the charter of King John to the reign of Edward 3, bishops were elected by the dean and chapter, and confirmed by the archbishop; and that, from the reign of Edward 3 to the time of his *statute, the pope had superseded the archbishop, except on

*569] a few occasions when the papal see was powerless. Then, what foundation, I would ask, has the Court for assuming that the usage of confirmation in the sense now contended for, prevailed in fact, or was generally known, down to the time of the statute, when the evidence is satisfactory only as to the interval from King John to Edward 3?

It is also necessary to ask, what foundation in fact there is for supposing that the legislature referred to that part of the canon law, relat-

ing to confirmation of ecclesiastical elections, which has been cited. The doctrine in that law on this subject is shown to have originated in the early ages of Christianity, when the whole Christian community, being the church, joined in the election of bishops; and the rules were pertinent to contested elections by large numbers, but are extremely inapplicable in case of a nomination by the King, whether direct, or circuitous through the medium of a dean and chapter. The foreign canon law has no binding effect in England; and the object of the statute (25 H. 8, c. 19) which immediately precedes the statute in question was to limit the canon law of England. It recites that several canons were thought to be prejudicial to the prerogative, and repugnant to the laws and statutes of the realm, and creates a commission for revising that law, and provides that, until this revision shall be complete, such canons only shall be used and executed as they were before the making of the act, and of these such only as were not contrariant to the laws, statutes, and customs of the realm, nor to the damage or hurt of the King's prerogative. It is improbable that the Parliament which so regarded the canon law intended *to use the word "confirm," not in its usual sense, but in a sense admitting a reference to that law in limitation of [*570 the important statute now in question.

The proclamations, purporting that those who object to the bishop elect shall be heard at the time of the confirmation, were next pressed upon us, as showing that the law was in accordance with their purport, and that the word "confirm," in the statute, was used in the technical sense before mentioned. But, if the construction of the statute is as above stated, it is inconsistent with the right indicated by the form; and a proclamation would be of no avail against a statute. Furthermore, if the proclamation be a mere form, it affords no presumption of any right: and, inasmuch as the election of a bishop by the dean and chapter is a mere form, and confirmation of an election is part thereof, the strong presumption is that the confirmation of a merely formal election is itself mere form. Indeed, it is in effect enacted to be merely formal; for the statute declares the election to be good, which is the substance of confirmation; and therefore it leaves nothing but a form to be added. It is obvious to legal experience that numerous forms of words prevail in our law which are at variance with the fact they purport to state, some being vestiges of rights that have ceased, some being fictions to cover changes introduced in the law, and some from other sources. No reason is suggested why the form used by the apparitor at the confirmation may not belong to this class. If it had been more than a form, the right of opposing would probably have been exercised; yet no one recorded instance has been produced of an opposer having exercised the right now claimed by the applicants, in any country, or at *any [*571 time. The industry and research have been extreme: no restriction has been placed on reference to any kind of work, English or foreign,

legal or historical : and all that has been shown in the way of acting on the right, before the present year, has been the attempt against Bishop Mountague, in the reign of Charles 1, which was evaded without a decision, and the reported intention of making the attempt in two other cases, which never reached to action.

If the evidence of the practical exercise of the right wholly fails, so does the evidence of opinion among the writers of recognised authority on English law. From Lord Coke to Mr. Justice Blackstone, no expression of any author has been adduced to show that the right in question was considered by him to exist, or had been brought to his notice.

The absence of usage, and the absence of recognition by text writers, is not merely a failure of support for the case of the applicants, but of positive force against them.

We were further pressed with the importance of a right tending to insure excellence in bishops, and to increase the confidence of the people in the Church Establishment : and such results were urged as making the existence of the right probable. But, if there are advantages on one side, the evils, which suggest themselves to a practical mind, may more than counterbalance, nay afford a strong argument to the contrary. But this inquiry is ill suited to the office of a judge, who has to declare the law as it is, not as it ought to be. And, as the inquiry would lead to considerations that might seem disrespectful to others if the abuses *572] of the institution which may easily occur were pointed out, I *merely suggest the nature of the answer that may be given.

Another point was made for the applicants, in answer to the construction of the statute, namely, that the sole purpose of the legislature was to put an end to the interference of the see of Rome with the English Church, and that the statute ought to be so construed as to limit its operation to that result. But the intention is clearly expressed, both to prohibit the interference of the pope, and also to lay down substantively the manner and form of electing, presenting, and consecrating the bishops of the church so severed from Rome. Effect must be given to every part of the statute : and those who claim to be bishops of the English Church ascertain their title by its positive enactments, which are complete without the negative enactments relating to Rome. The full operation of the statute not only destroys papal influence but declares the rights of the King, and fixes clear limits against encroachment : and the Legislature, warned by the history of past troubles, had reason to provide against future contentions between the Crown and all ecclesiastical authorities.

After giving my best attention to the argument, my mind is brought to the clear conclusion that the supposed right does not exist, and that the rule for a mandamus ought to be discharged.

COLERIDGE, J. I am now to deliver my opinion upon this rule, which

has been argued at the bar with such remarkable learning and ability. And I cannot but express my regret that I am called on to do so at so short an interval after the discussion, and one so much engaged as entirely precludes the deliberate and *satisfactory consideration of the argument, and attentive examination into the authorities, [*573 which the importance of the question at issue deserves. I regret this the more deeply, because I feel myself compelled to differ, I fear, from my Lord, and, as I learn, from my brother ERLE, not merely upon the legal conclusion to be drawn from the arguments adduced, but upon the practical disposal of the rule before us. Upon the former I should express myself with diffidence, even if I had the happiness to have them concurring with me. The question, narrowly and simply as it may be propounded, has yet been argued, and properly argued, on grounds so large, and inquiries have been instituted so various, so wide, mounting up to such remote and obscure antiquity, spreading out into branches of law with which we are so little familiar, that it is rather excusable in an advocate, than possible, I think, for a Judge, to express himself with any strong confidence upon it. At least, speaking for myself, I must confess unfeignedly such is the state of my mind after such examination as I have been able to give to the subject. Upon the latter, the mere disposal of the present rule, I must avow in sincerity that I have no doubt; and it is a great consolation to me that, by the course which I should recommend, any error of judgment into which I may have fallen would not be final.

I am not insensible to some, it may be great, public inconvenience which might result from the needless agitation of a question such as the one before us. I own I think it has been somewhat exaggerated: but, whatever may be its amount, it is to be remembered that there will be no light compensation in the more satisfactory settlement by a conclusive and final *judgment in the highest resort, which it would then receive. But, after all, the inconvenience is not all on one side; [*574 and there is no consideration so strong with me as the danger of doing a final injustice by unnecessarily taking a course which precludes all further consideration. I cannot doubt that those from whom I have the misfortune to differ entertain these feelings in general as strongly as I do myself; but I presume they think the present question one with regard to which they cannot properly be indulged. They regard the application to the Court as mischievous, or at best of little practical importance; one not to be listened to with favour; to be complied with only so far as it is rested on the clearest and most demonstrative evidence. The course of my judgment will show to what extent I differ from them in this opinion. On both sides it has been urged that the interests of the Church are at stake; and no doubt to some extent they are: but I trust and believe that, in this respect also, some natural exaggeration exists on both sides, and that, when the ferment of the moment

shall have subsided, it will be found that neither to have secured or enlarged her just freedom of action on the one hand, nor on the other to have laid more bare, or more firmly to have riveted, the restraints imposed on her by the statute, will have vitally affected those precious and immortal interests. For my own part, I am desirous, and I am not ashamed to confess it, entirely to forget, for a moment, considerations which affect the mind so powerfully as it may be to disturb its calmness, and to regard the mere question before me more coldly. In this feeling it is that I desire to rest my judgment on this narrow ground, simply on *575] my conviction that the applicants have laid such grounds *before the Court as, according to its usual course and the principles which have usually governed our discretion, entitle them to the writ of mandamus, and to call on the defendants either to demur, or to make a return.

And the first questions which arise, preliminarily almost in the way of the argument are: Is this the case, in kind, in which a mandamus can issue? Have these parties such an interest as entitles them to demand it at our hands? Upon these, by way of direct answer, I shall be the less full, both because I believe the Court are agreed to the extent at least of thinking that there is no such difficulty on either point as should prevent the writ from issuing, and also because the more full and complete answer in both respects will depend on the result of the more general discussion that remains behind.

For the present, therefore, I will only say that I think this was a case of an inferior court with a question before it for decision, in which parties lawfully summoned to appear, and having a sufficient interest, have prayed to be allowed to appear and to be heard, and have been refused. If this general statement be true, and I admit that its truth will depend on the result of the whole argument, I think it cannot be doubted that it is within the province of this Court by mandamus to compel the inferior court to admit them to appearance, and hear their allegations. Nor will it be an answer, simply, that such inferior court is an ecclesiastical one, or the matter in discussion of ecclesiastical cognisance; the Ecclesiastical Courts, as such, are not withdrawn from the general superintendence or control which this Court exercises, by mandamus or prohibition, over all inferior courts. We cannot, *in-
*576] deed, direct the course of their proceedings, or prescribe their judgments beforehand, nor review them in the way of appeal afterwards: they are the judges of their own practice; they are to frame their own judgments according to their own law, when that law alone is to be the rule of decision. But still we shall compel the ecclesiastical judge, as we would any other inferior judge, to act in his duty, just as we should, and constantly do, restrain him when he appears to be about to exceed his jurisdiction.

This stands on the clearest principle. And it would, I believe, have

been hardly necessary to say the few words I have said on this subject, but for the misunderstood case, cited in the argument on this point, of *Rex v. The Churchwardens of St. Peter's, Thetford*, 5 T. R. 364. That case is so often cited, and its importance so magnified, that one is surprised to find its whole statement and argument comprised in six lines, and its judgment in less than two. The Court there refused a mandamus, to churchwardens alone, to make a rate for the repairs of the parish church, saying that it was a subject purely of ecclesiastical jurisdiction. I, for one, do not question, upon consideration, the propriety of that decision; though perhaps I might wish that the judgment had been reported at greater length, or expressed in less general or more qualified language. The whole subject-matter of church repairs and church rates is of ecclesiastical cognisance: to the Ecclesiastical Court the applicant was bound to go in the first instance; and there was no reason to suppose that that Court would close its doors against him; there was no alleged defect of justice, and therefore no ground for this Court's extraordinary interference. What bearing that decision [*577] has on the present case it is very difficult to see.

Nor, I think, does any difficulty arise from the fact that the Ecclesiastical Court here has heard one side, and proceeded to judgment. In the course of the argument, the counsel were asked whether any case had been found in which, under such circumstances, the writ had gone: and the answer was in the negative. Mr. *Robinson* has referred us to the case of *Rex v. The Justices of Carnarvon*, 4 B. & Ald. 86, in which, on an application for a mandamus to sessions to hear where they had decided, Mr. Justice HOLROYD said: "If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue." It is always very satisfactory to have such authority as Mr. Justice HOLROYD's for any position one lays down; but I confess that without it, on this point, I should have had no difficulty. In regulating our discretion as to the issuing of a mandamus, we are to be guided I think, rather by principle than precedents. In order to secure the full and complete administration of justice, we are to regard substance and not form, or we shall be intrusted to little purpose with this invaluable writ. If the case on the part of the applicants be in other respects well founded, the hearing that has taken place is the same as no hearing; the decision is no decision.

This last observation, with another closely connected *with it, [*578] disposes of another objection, that the complaint of the applicants is in truth a complaint, against the court below, of an error in its practice or its decision, and their remedy by appeal. If there has been no decision, there can be no appeal; if there has been no party, there can be no appellant. And so, as to the right of a party to prosecute any

particular suit in any particular court, that court may have its own rules according to which that question will be to be determined as it arises; and this Court will not in general interfere with such rules, still less with the court's decision upon them: but, before the point arises for decision, before the court can apply its rules, the party must be admitted as a suitor to state his case.

Considerable stress was laid, by the counsel against the rule, on the want of interest in the applicants to entitle them to come to us for the writ. On many grounds it seems to me that they had sufficient; they are all, indeed, involved in the general question which will remain to be discussed presently. If the whole proceeding on which the inferior court was to be engaged was a mere form and shadow, if the citations to appear were mere mockery, interest in anybody there could be none: and on the same supposition these applicants have no interest here; at all events, it would be a waste of the time of the Court even to listen to their application. But on the other supposition, which for this purpose they have a right to make, the citations themselves seem to give them an interest, and still more the relations which two of them as incumbents in the diocese of Hereford have, in the faith and doctrine of their future bishop. We have more than once determined that the interest which an *579] inhabitant, *merely as such, and though no member of the corporate body, has in the good government of the borough or city which he inhabits, is sufficient to entitle him to be relator in a quo warranto filed to question the election of the mayor or members of the town council. The analogy between the two cases seems to me to be perfectly just.

It is not worth while to notice the objection founded on the Church Discipline Act, which could scarcely have been seriously urged.

And I pass without further delay to the great question in the case, the proper construction to be put upon stat. 25 H. 8, c. 20. And, in applying myself to that question, I need not say, in this place, that our object must be to ascertain, not what it might be supposed Henry 8 intended or wished, but the true meaning of what the Legislature has written. If the former consideration could be properly admitted into the inquiry, or the evidence upon it ascertained satisfactorily, I have no reason to believe that it would be in the result unfavourable to the view I take of the statute. But on general principles that cannot be. It is not *quid voluit Rex*, but only *quid dixit Parliamentum*, that lawyers, indeed any reasonable interpreters of the law, can inquire into.

The statute in the fifth section enacts that, after an election of a bishop by the dean and chapter of the cathedral church of the see, the King shall signify the election to the Archbishop of the province, requiring and commanding him to confirm the said election. And the question now for the first time to receive a judicial decision is, What is the import of this command? On the one hand, it is said that it created a new duty in

*the archbishop, invested him with a new function, but that the duty and function were both purely ministerial, and the act to be done a mere valueless form: on the other, it is contended that the act of confirmation is a solemn important judicial act, which from the earliest ages of the Christian Church it was a part of the archbishop's or metropolitan's duty to perform, and that the command in the statute was to perform that act, in virtue of that office, with all its attendant responsibilities in the officer performing it, and consequences to the election with regard to which it was performed. [*580]

It is obvious that those who maintain this latter ground take upon themselves a large burden of affirmative proof. In order to show what confirmation means in this section, they seek to show what it meant from the earliest ages down to, and at the time of, the statute's passing. And no one will question but that this, if satisfactorily made out, is, both on legal principles of interpretation, and according to the plain common sense of mankind, a proper mode of arriving at the true meaning of the word. If the confirmation of a bishop elect was a process known at the time of passing the act, of a certain nature, to be performed by a certain functionary, and having certain consequences, the language of the Legislature simply directing that functionary to go through that process would deceive and mislead unless it were used in that sense, and as containing and involving everything so known and understood. I use the words "simply directing," because the Legislature might use the word, though incorrectly, in any other sense: and, if other parts of the statute make it clear directly, or by strong inference, that it was used in some other sense, unquestionably *that must prevail. It is necessary, therefore, for the applicants to examine all parts of the statute, [*581] and to show that, taken altogether, no inference can thence be drawn which contradicts the presumption to be drawn from their antecedent historical evidence. Even if no such inference can be drawn from the statute itself, it might be, though not so easily or clearly, drawn from the provisions of other statutes, contemporaneous or about the same period, in *pari materia*. It was fitting, therefore, to take such statutes, if any, into the account. Lastly, it was right to examine what, in point of fact, was done, and has been done, at the time or in succeeding ages, by those who were to obey the statute. No usage can control the unambiguous language of the law; no disuse can render it obsolete; but, when the question is upon the meaning of the language, what has been done under it may be inquired into, as of more or less cogency, according to circumstances, in determining that question.

There are, then, four heads of inquiry. The first, third, and fourth may be considered, for the most part, inquiries into matters of fact; the second is one of construction.

I do not propose to follow the applicants through them all: the time forbids my doing so satisfactorily, even with regard to those that I shall

inquire into. In my opinion, they have made, upon each and all, a case so strong as raises a firm belief in my mind that the conclusion they come to is the true one; and I think they have on none received such an answer, or had such difficulties raised, as disentitle them to the writ they ask for. This is enough for me to assert. By the practice of this Court, as I have always understood it, *and as it has been acted *582] on uniformly since I have had the honour of practising at its bar and sitting on its bench, the discretion of the Judges has been regulated as to the issuing of the writ of mandamus thus: they have not required absolute certainty in fact, or a clear or unanimous opinion in law, as the ground of issuing it. If the fact be made so probable as to require an answer in reason, or an answer be attempted in the affidavits of those who show cause, it has been thought right to let a jury decide the question. If the conclusion of law be probable in favour of the motion, or the question be one of difficulty, requiring a solemn decision, it has been thought right to let it be raised on the record. Since the recent interposition of the Legislature,^(a) which has made our judgment on such record subject to revision in Courts of Error, it is obvious that the reason for this latter branch of the rule has received a much increased force.

Two general remarks must still be made before I examine the historical evidence prior and down to the passing of the statute. If that evidence were now before a jury, and a judge were summing it up, I apprehend it would be his duty to tell them that it was to be considered by them with a reasonable allowance for the circumstances under which it was produced, and, among those, especially, the length and remoteness of the periods through which the chain was sought to be carried. To expect that a title, which is to be traced down for centuries, through periods, many of them, of struggle and disturbance, which was subject to *583] the confusion occasioned by contending claims and foreign *usurpations, should be made out with the unbroken continuity and uniform clearness which might properly be required in discussing a simple transaction of to-day, could not even then be required, because it would be impossible to accomplish, and therefore unreasonable to ask for it. Independently of the effect of these circumstances on the evidence, they must be expected to produce something of a similar kind on the title itself, or series of facts which is the subject-matter of the evidence. What we said in a case in which we had to consider an ancient franchise of the University of Cambridge,^(b) being invited to disturb its enjoyment on ingenious objections, may be not improperly applied here. "It follows," we said, "almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period: a little advance is made at one time, a retreat at another; something is added, or taken away, from indiscretion, or ignorance, or

(a) 6 & 7 Vict. c. 67.

(b) Regina v. Archdall, 3 A. & E. 281, 288.

through other causes: and, when by the lapse of years the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So also with regard to title: if that which has existed from time immemorial be scrutinized with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents of time, no ancient title will be found free from objection: that, indeed, will become a source of weakness, which ought to give security and strength."

If considerations like these ought to have place, and *such language to be held, in regard to this evidence, on a trial before a [*584 jury, it is obvious that in the present stage of the inquiry they have tenfold propriety and weight. I do not present it as an analogy strictly conclusive: but the province of the Court at present resembles more that of the grand than of the petty jury. If we refuse the rule, we do, indeed, preclude further inquiry: we pronounce our opinion that there is nothing to be inquired into; either that the evidence is so worthless or irrelevant, or the subject-matter so unimportant, that we will shut the door of justice on the prosecutor. But, if we grant it, we only say the present state of the proof requires an answer; enough has been done to make the case fit for further inquiry and more solemn decision. If this be so, surely we ought to examine the evidence with candid minds, making due allowance for all its inevitable difficulties. We should remember that it travels into remote periods, and turns upon facts of a kind which do not often come before us, and a law and legal literature with which we cannot be familiar. Whatever decision we now pronounce (I speak as I feel for my own share in it) is more than commonly obnoxious to error: it is a safe rule—a conscientious rule—it is *the* rule of the Court, as I at least understand it, to decide so that error may be less likely to end in final injustice.

It is under these conditions that I enter on the inquiry I propose to make.

The case on the part of the applicants commenced with evidence offered even from the Apostolic ages of the church. I am content to start with the General Councils. I presume the authority of these councils, on a matter of church government in England before *the [*585 Reformation, will not be questioned. Even as to matters of doctrine, their authority is expressly recognised in the legislature after the Reformation in stat. 1 Eliz. c. 1, s. 36. At a time when Christendom was united as one body, it was considered to represent the whole inhabited earth: and when the springing up of any important heresy, or other such urgent cause, occasioned the assembly of a Council from all nations, it was oecumenical, τῆς οἰκουμένης, and bound all the members of the one entire body. Four great heresies, it is well known, occasioned

the summoning of what Hooker^(a) calls "four most famous ancient General Councils:" and of these we have canons by two, those of Nice and Chalcedon,^(b) which speak of the confirmation of episcopal elections, in terms, as being penes metropolitanum; that one elected præter voluntatem et conscientiam metropolitani ought not to be a bishop; non oportere esse episcopum. Limit these last words as you please, though, if you construe them by the light of the former, you cannot much reduce their force: assume, if you will, that these canons had reference to a period when elections of bishops were more popular than even in form they had been in England since the Conquest, though both Councils, be it observed, were called by imperial authority after the civil establishment of Christianity, and after the rulers of the earth had assumed part in the nomination to bishoprics: still you have the undisputed fact, that in those very early ages the metropolitan did intervene; his confirmation was necessary to complete the election of one of his provincial. Could anything be more reasonable *than that he *586] should intervene, when he was to administer consecration, and when the bishop elected was to rule over a diocese within his province, subject to his visitatorial power, liable to deposition at his hands?

I am compelled to pass over a large body of evidence of the same kind, some from General, some from National, Councils; for I am only indicating the grounds of my opinion, not going into the whole detail of the evidence. These precede the rise of what is called the general canon law. Now, as I understand it, it is not so much contended that under this law the point is not satisfactorily made out, as that there is no ground for admitting this law as of any authority in settling the question with regard to England. When we speak of England before the Reformation, I confess I hardly understand this difficulty. We speak, then, of a country within the pale of the Roman Catholic Church, admitting "our holy father, the Pope," as he is commonly termed in the very statutes which sought to restrain his usurpations, to have in spiritual causes and matters appellate jurisdiction from all ecclesiastical judges here. The canon law regulated all decisions in spiritual matters at Rome. The decrees of councils and of popes, the opinions of learned men, and other sources on which it was founded, would be naturally received as authority in the courts of other countries from which appeals lay to Rome. In this country they obtained their binding authority, no doubt, from custom, and were subject to the control of our statute and common law. Some instances of this control are familiar to lawyers; but it operated in comparatively few and exceptional cases. As the general rule, it is quite safe to say that *587] our *Ecclesiastical Courts governed themselves by the general canon law, which was, in truth, the law of that one Catholic

(a) Ecc. Poll. B. V. c. 54, s. 10, vol. ii. p. 303, Ed. 1836.

(b) Harduin Act. Conc. tom. i. p. 325, tom. ii. p. 611.

Church of which the English Church was a branch. Concurrently with this, however, we had a national Canon Law, not a complete system, or furnishing a rule of decision, if taken by itself, for all cases; for this was founded solely on the occasional Legatine Constitutions, or ordinances of national or provincial Synods. Upon these we have the comments of Lyndwood and John de Atho, which show conclusively that they were never intended to overrule generally, or supply the place of, the general Canon Law, or to do anything more than to supply deficiencies, where particular local circumstances made it necessary.

In this part of the argument, it is hardly in course to consider the effect of this law after the reformation. But I stop for one moment, in consequence of an observation or two which has been made, to offer an observation upon stat. 25 H. 8, c. 19, as it affects the present state of the canon law in this country. Now, the proviso which has been referred to at the close of this statute refers expressly to the preamble and is confined to it. But that preamble is not speaking of the general Canon Law; it is speaking of the canons that had been ordained in the provincial Synods or Councils of this country. "Where," it says, "the King's humble and obedient subjects, the clergy of this realm of England, have not only knowledged according to the truth, that the convocations of the same clergy, is, always hath been, and ought to be assembled only by the King's writ, but also submitting themselves to the King's Majesty, have promised in verbo sacerdotii, that they will never from henceforth presume to *attempt, allege, claim, or put in use, or enact, promulge, or execute any new canons, constitutions, [*588 ordinance provincial, or other, or by whatsoever other name they shall be called, in the convocation, unless the King's most Royal assent and license may to them be had, to make, promulge, and execute the same; and that His Majesty do give his most royal assent and authority in that behalf: And where divers Constitutions" (the lawyer immediately remembers the Constitutions of Othobon and Otho that are stated in Gibson), "Ordinances and Canons Provincial or Synodal, which heretofore have been enacted, and be thought not only to be much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm, but also over much onerous to his Highness and his subjects; the said clergy hath most humbly besought the King's Highness, that the said constitutions and canons may be committed to the examination and judgment of His Highness, and of two and thirty persons of the King's subjects." And then it goes on to state the terms of the commission which is to be appointed for the investigation. Then, after enacting the mode in which the commissioners are to proceed, it provides: "That *such* Canons, Constitutions, Ordinances, and Synodals Provincial being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative Royal, shall now still be used and exe-

cuted as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said two and thirty persons." It is well known that that commission never was effective: and it is upon that footing that *what I call (dis-
*589] tinguishing it from the general Canon Law) the national Canon Law of this country at present stands.

When, then, upon a point of ecclesiastical law arising before the Reformation, the decretals or works of the canonists are cited, surely the presumption is, that they tell us truly what the Church law in England then was, and the onus lies on him who would allege that, by reason of some statute or contrariant rule of the common law, the case was not decided by them.

I do not cite again the different passages referred to in the arguments, nor enter into the criticism which was addressed to show that some of them did not apply to confirmation of episcopal elections. The result, to my mind at least, left it clear that what had been decreed by councils had been adopted into the canon law; that elections were subject to confirmation by the metropolitan; that such confirmation was a real judicial proceeding; that the process of the election, *processus electionis*, and the *persona electi*, were the subjects for consideration; as to which witnesses were examined, and the result was not unfrequently unfavourable to the elected. It was contended that "*persona electi*" limited the inquiry only to his identity: but this was conclusively disproved by the causes assigned more at length in some of the cited passages, and also in some instances actually recorded in history, from which it appeared that the morals, learning, legitimacy, anything, in short, which went to make up canonical fitness, were made the subject-matter of inquiry. And I may observe, in passing, that I do not remember a single instance in which the *persona electi*, limited to *the point of mere identity,
*590] was ever brought into question at all

When it was sought to show the actual application of this law of confirmation to elections of English bishops, a difficulty was raised to which the frequent struggles between our monarchs and Rome lent a colour. When the monarchy was weak or the throne contested, the papal power often made advances; the practice of provisions would often interfere with the metropolitan's confirmation; for, if the pope nominated, of course a confirmation was needless: often, too, it would be that which was properly the appellate jurisdiction would draw to itself improperly the original cognisance. Still, after every deduction made on these accounts, a body of proof remains, substantial and abundantly satisfactory, that the ordinary jurisdiction of confirmation was in the metropolitan.

Here I allude, as I intended to do before, to the instances cited from Wharton's *Anglia Sacra*, a book undoubtedly of great interest; not merely, be it remembered, a modern work—to speak as modern of any

work written in the seventeenth century,—not merely an original work of the author at that time, but, as it appears from examining into it, in great part a collection from ancient, and some of them contemporary, writers. The instances adduced by Mr. *Badeley* ranged from 1277, 5 Edw. 1, to 1416, 3 Hen. 5. I do not mean to repeat them; but I take the first, for two or three reasons; it is remarkable for several circumstances which are mentioned in it. The monks of Winchester elected Robert the bishop of Bath and Wells; (a) the Archbishop of Canterbury rejected him for having *formerly been a pluralist; and this was done by virtue of a canon of the council of Lyons, passed only [591 three years before. It is observable that in one of the constitutions of Otho or Othobon, I forget which, (b) the same circumstance, pluralitatis causa, is made the ground of objection to the election of a bishop. A second elected in his place was rejected by the Archbishop, for the same cause. Here we have two instances in which a canonical offence, first created by a foreign council, was made the ground of rejection. Upon the second occasion, the bishop elect appealed to the court of Rome, where he was opposed by the primate, who is spoken of as a man ecclesiasticæ disciplinæ observantissimus. Wharton says, he was so intent on sustaining the rejection as to declare that he would resign if the case were decided against him; and he succeeded in having his judgment confirmed. But then the pope took occasion to appoint to the vacant see himself, and caused the consecration to take place at once at Rome. The new bishop appears from his name, Pontissara, to have been an Italian, already archdeacon of Exeter, probably by papal provision, and professor of civil law at Modena. This extract, while it is strong to show the reception of the canon law, the jurisdiction of the metropolitan, and the reality of the confirmation, shows also the irregularities which would often occur and disturb the exercise of that jurisdiction, owing to papal interference. This author is full of instances which show the operation of papal provisions, and of appeals to Rome, in the most interesting manner. The case of Robert Orforde, the fourteenth bishop of Ely, (c) I may *mention as an example, where, after election [592 objected to, and cancelled by the archbishop, the party goes to Rome and appeals against the rejection. A discussion is stated to have taken place before the Pope and his cardinals; a statement is made by the bishop elect to the Pope, of the examination which he had undergone, and the answers that he had made. He appears to have conducted himself so well, that the Pope says: “ ‘Certe fili bene respondisti. Non te invenimus, sicut scripsit nobis frater noster Cantuariensis, vas vacuum; immò vas omni bonitate et scientiâ repletum te esse approbamus.’ Et suam confirmavit electionem; ac ibidem celebrari fecit ipsius consecra-

(a) Wharton, *Anglia Sacra*, vol. i. p. 315.

(b) Of Othobon; p. 133 of Appendix to Lyndwood's *Provinciale*.

(c) Wharton, *Anglia Sacra*, vol. i. p. 640.

tionem." Here is an instance in which the appellate court, pronouncing the judgment which ought to have been pronounced below, carries it into effect by celebrating the consecration upon the spot. The termination of this affair shows an instance of the real grievance which this country sustained under papal exactions and usurpations; for it is said: "His itaque negotiis feliciter expeditis, iter versus Angliam statim arripuit; et ad suam Elyensem ecclesiam prosperè pervenit; plus quam xv. millibus librarum ære alieno oneratus." So that the appeal had cost him 15,000*l.*, the enormity of which sum at that time of day can be easily ascertained.

I have stated that the latest instance which I have noted, as referred to in the argument, was of the year 1416, the case of John Wakeryng, bishop of Norwich.^(a) He was confirmed by the metropolitan, under circumstances which at first sight create a difficulty, but, I think, on consideration, are not only explainable, but may serve to throw light on the *593] language of the statute *now in question. This was the period of the great papal schism. There were three antipopes. Henry 5, preserving a neutrality between the rival candidates, treated the see of Rome as vacant; and, by consequence, those bulls and briefs which had become established as necessary to the completion of episcopal election could not be procured from any one. An act of parliament, therefore, passed in 3 H. 5,^(b) reciting that, for this reason, confirmations could not be made, and great inconveniences followed, and enacting that, during the avoidance of the apostolic see, bishops elect should be confirmed by the metropolitans, without excuse or delay made on that account, and that the King's writs should issue to the metropolitans, straitly charging them to perform the said confirmations, and all that to their office therein appertains; and also to the elected that they should effectually pursue their confirmations before the archbishop. In the fourth volume of Rymer's *Fœdera*, in the second part, p. 156, will be found the writs accordingly issued both to Wakeryng, the bishop elect, and the metropolitan, for the confirmation. That to the latter enjoins him to proceed, "*Absque excusatione seu dilatione aliquali, procedatis, ac cætera omnia, quæ vestro canonicè incumbunt officio, in hac parte, peragatis et exequamini.*" It is not to be inferred that the confirmations were ordinarily by the pope, but that the metropolitan could not proceed to confirmation or the other duties which were canonically incumbent on him as such, upon the election of a suffragan within his province, without a mandate or bull from the pope. The language of the statute and writs shows that confirmation was part of the canonical *594] *duty of the metropolitan; and it shows also that at the time the King's assent to the election was not sufficient by the common law of the church without the pope's sanction to the confirmation. The stat. 3 H. 5,^(b) was a temporary measure, which met the difficulty occa-

(a) Wharton, *Anglia Sacra*, tom. i. p. 417.

(b) Rot. Parl. vol. iv. part 2, p. 71.

sioned by a vacancy of the apostolic see ; nothing can be stronger to show the imperfectness of the royal title of itself completely to fill up bishoprics. We find from Wharton (*Anglia Sacra*, tom. 1, p. 417) that when the Council of Constance had terminated the papal schism, and Martin 5 was elected Pope, he ratified both the confirmation and consecration of this very Wakeryng, who had attended the Council with other ambassadors from Henry. With the election of Martin, the statute 3 H. 5(a) would expire, and that state of things would revive which the several statutes of H. 8, passed shortly before stat. 25 H. 8, c. 20, and that statute itself, show us to have been then existing ; the chapters electing, with apparent freedom, but certainly under the indirect influence of the Crown ; the pope then upon request issuing various bulls, which had been made necessary, no doubt, for the purpose of exercising influence and exacting money ; among others, one to the metropolitan to proceed canonically to confirmation and consecration ; the metropolitan then undertaking the confirmation subject to appeal, and finally, on approval, if no appeal made or the pope did not by some assumption of power interpose, the consecration.

Before I pass from this part of the subject, let me observe that every case of papal confirmation and consecration must not be taken as evidence against the metropolitan's ordinary power. Rightly or wrongfully *(and, had the bishop of Rome, happily for Christendom, been content with the lawful precedence and power which he might [*595 have claimed as patriarch, he would rightly have claimed appellate jurisdiction in such matters), but, at all events, as matter of fact, he claimed and exercised it. If, therefore, he decided an appeal in favour of the bishop elect, his decision was in fact a confirmation ; and he might, as appellate judge, then execute the duty of the inferior judge, and consecrate at once. When beyond this he took on him, having rejected the bishop elect, to confer the see on a nominee of his own, this was a mere usurpation, growing out of his wrongful assumption of the title and place of universal bishop of the whole Christian Church.

I now close an inquiry which I am sensible I have been led to follow to a wearisome length ; and yet I cannot expect, imperfectly as the case has been expanded even at this length, to have conveyed so clear a view to others, as I seem to myself to have, or so strong a conviction that, when Henry 8 and his Parliament came to legislate with regard to episcopal elections, they had to deal with confirmations by the metropolitans as real transactions, judicially conducted by them ; in virtue of a jurisdiction from the earliest times inherent in their office.

We are now to see how they have dealt with confirmations in the famous statute under consideration. But the examination which I have to make of its several clauses will be more intelligible, if I preface them with a statement of the general view which I take of its policy and

purview. And, in forming this, I think myself bound, as a lawyer, to regard only the legitimate and certain guides to interpretation which *the state of things at the time it passed, the existing mischiefs *596] proposed to be remedied, its own language, and contemporary statutes, afford. The personal character or wishes of the monarch, on the one hand, it would be unsafe to attach much importance to, unless I knew, on the other, the amount of ability, sound-heartedness, devotion, or power, which might be found in the individual framers who penned or in the united body which enacted it.

I conceive, then, that there were two prevailing objects: the first, to put on a clear foundation the royal power in the nomination of bishops. Although the Crown's right to present was in substance well acknowledged, whether depending on the supposed right of patronage, or the inherent and constitutional right of the Crown, yet, in the theory of the law, the office of bishop was an elective one, and elections were free; and these two principles would sometimes be found in contest with each other. The exercise, too, of the Crown's right, in spite of previous statutes, would sometimes, indeed not seldom, be impeded by papal interference, in the way of provision. I may, in passing, observe that the recitals of ancient statutes, and the language of our text books, place the right of the monarch much more on patronage than on imperial power. The bishoprics were donatives, in the commencement, because the Crown had founded and endowed them. When, at an early period, elections revived, the Crown was still patron, and presented; but then revived confirmation: and the analogy between a bishopric and an inferior representative benefice was in this point complete. The second, and perhaps *597] more urgent, object was, effectually to prevent all *interference from Rome with the completing the making of the bishop whom the Crown should have nominated, and also to secure the prompt obedience of the metropolitan to the royal commands.

For effecting the first object, it was not thought necessary, probably not desirable, to alter the ancient canonical mode of proceeding by election. If lawyers and canonists were engaged, as is probable, or consulted, in the framing of the act, they would be aware of many inconveniences which might arise from a departure from the ancient mode. The law had attached certain rights to certain steps in the process (see *Evans v. Ascuthe*, Palm. 457, 472); and evils, foreseen and unforeseen, and of course not easily to be guarded against, might be apprehended.

If divines, as is still more probable, were consulted, they would naturally be slow to sever one link unnecessarily from the venerable chain which bound our Church in communion with the great Christian commonwealth. Election, therefore, was preserved: but, as it was to be preserved in form only, that change was clearly and unambiguously made by the introduction of a new instrument, the letter missive; and the statute

was so worded that no question could possibly be raised ; nothing was left to cavil or exception.

Assuming that the chapters proceeded according to law, for effecting the second object nothing new was required to be added in the remaining steps. Some things would be to be taken away. There would be confirmation, still as necessary as before ; for there was no intention to interfere with the metropolitan's inherent powers, or to disturb the ancient relations between *himself and his suffragans, and the King might be deceived in his appointment, and did not arrogate to himself [*598 spiritual powers. Not a word, therefore, was admitted which might be interpreted to derogate from the metropolitan's jurisdiction ; rather it was increased, by relieving it entirely from all papal review. Consecration would follow on confirmation, as before : but in both it was necessary, especially at the time of the enactment, both to guard the metropolitan on the one hand, and the Church and the Crown on the other, in the case of Romish tendencies in the metropolitan, from every sort of papal interference or impediment, by the severest sanctions.

If these were all the provisions of the statute, there would be no difficulty in the view I have presented of it ; but something remains. Two parties were concerned in the making of a bishop, after the nomination by the Crown. The electors and the metropolitan both might thwart the nomination ; the former by refusing to elect, the latter by refusing to confirm and consecrate. The former might be punished for disobedience, but could not be compelled to elect ; and therefore, in the place of a formal election, where that was refused, the King was to nominate by letters patent. In reason, perhaps, it might have been expected that in this case some new process equivalent to confirmation should have been provided. Confirmation itself in terms would not be preserved, for that was the act of a superior authority, and would have been a scarcely decorous process to be carried on in respect of one who was the direct grantee of the Crown ; and ancient usage, besides, had appropriated that process to election. The Crown would be unwilling to create anew any *substitute ; and it was the less necessary, because the metropolitan's power and responsibility remained untouched in [*599 the consecration ; and, though he might be punished for wilful and groundless refusal to consecrate, he could not be compelled to do that act ; and no provision was made (a most remarkable circumstance) for procuring the consecration by any other means of him whom the metropolitan should refuse to lay his hands upon.

Let us now see whether the statute itself does not agree with the view I have presented. The first and second sections recite those parts of stat. 23 H. 8, c. 20, for restraint of payment of annates to the see of Rome, which regarded the impediments to consecrations growing out of the alleged papal exactions, and provided conditionally for the consecrations to proceed without regard to the papal bulls where they were vexa-

tiously delayed; and state that these provisions had been made absolute by the King's ratification of them, in consequence of the failure of any satisfactory settlement with the court of Rome. The grievances suffered from the court of Rome are presented as the mischief to be remedied; and the whole spirit and language are studiously hostile. He who in the recited statute but two years before had been our "Holy Father the Pope," or "The Pope's Holiness," is now the "Bishop of Rome, otherwise called the Pope;" and the "Court of Rome" is changed to the "See of Rome." The recited act had made only the conditional provisions before alluded to, but had not plainly and certainly expressed in what manner, for the future, archbishops and bishops should be elected, presented, invested, and consecrated. The third section of the act therefore *600] first takes away absolutely for the future all presentations to Rome, all procuring of bulls or palls, or other things requisite for an archbishop or bishop, from Rome, and all payments of any kind for them.

Thus far every word in the act is directed against Rome. In the fourth section begin the positive provisions. First comes the license under the Great Seal, "as of old time hath been accustomed," to proceed to an election. Here the word "election" is used as a known term; no form is prescribed; everything is to be done in this respect as before. Then is added the new "letter missive," containing the name of the person whom the electoral body shall elect and choose; they are then, "with all speed and celerity," in due form to elect the said person, named and none other. The object of election has now been spoken of twice simply as "the person;" no qualification of any kind has been mentioned, nor will any be found through the whole statute; and the Crown lawyers are driven to contend, as they have done, that no qualification was intended, nor can be admitted. As to canonical age, they say that a restraint on the generality of this act was created by later statutes, the statutes of Edward 6 and Charles 2;(a) but, even as to that, they contend that the Crown was unfettered when this act passed; and, as to every other canonical impediment, every consideration of learning, morals, and faith, is so at this moment. As I understood, and I should be very sorry to misrepresent, the argument of one of the learned counsel, he met the difficulty of canonical impediments by attributing to the Crown, as supreme head of the Church, the dispensing power of the pope, and affirmed that *the mere act of naming a minor in the *601] letter missive was a virtual and effective exercise of the power. I will only say these are strange arguments to be now advanced, against which, as a member of the English Catholic Church, I strongly protest. Whether it may be that the letter missive joined to the license to elect can be taken in such a sense to reduce the election to a mere form, so as to make the act of the electors merely ministerial, and therefore to ren-

der all consideration of qualification quite immaterial, it is not necessary now to decide, and I will not take on me to affirm. I should rather think that the silence of the whole act as to qualification is to be attributed to this, that it was passed entirely *alio intuitu*, and left that matter to be considered, as it had been before, by the proper ecclesiastical authority. Upon failure of an election by the delay of the chapter, the statute next authorizes the Crown to nominate and present by letters patent such persons as it shall think able and convenient; and, by the fifth section, the archbishop of the province, for to him alone, if there be one at the time, the nomination and presentment must be made, "shall with *all speed and celerity* invest and consecrate" the patentee, "and give and use to him pall, and all other benedictions, ceremonies, and things requisite for the same, *without suing, procuring, or obtaining hereafter any bulls* or other things at the see of Rome, for any such office or dignity in any behalf." Here as before with regard to the election, the words "all speed and celerity" are introduced; the consecration is to be in the ancient form; all the same ceremonies are to be used, but without procuring any authority from Rome. It is not a command to the archbishop simply to consecrate, but to *consecrate "with all speed and celerity," so as not by delay to allow time [*602 for impediments from Rome to arrive; and without himself suing for or procuring any authority whatever from Rome.

The statute then returns to the elected bishop. "Their election," it is enacted, that is, the election of the electors, "*shall stand good and effectual to all intents;*" and, after certification of it to the Crown, the person elected "*shall be reputed and taken by the name of lord elected of the see.*" These are words on which great reliance is not unreasonably placed; and it would be uncandid in me to deny that I have felt their weight: but they seem to me to be inserted with a twofold view: first, to meet one of the great divisions into which the inquiry at confirmation was by the canons branched—I mean the *processus electionis*; so far as the electors were concerned and their act of election, there was to be no impeachment of their proceeding; whether the party were qualified canonically or not, their act was good, and the party became lord elect: and, secondly and mainly, this election was to have its virtue without the aid of any papal allowance.

The lord elect is then to make his "oath and fealty *only to the King's Majesty,*" prohibited thus from any oath of subjection to Rome; and the Crown shall signify the election to the archbishop, requiring him to "*confirm the said election:*" the words "speed and celerity" are here omitted; and he is required "to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls,

letters, or other things from the see of Rome for the same in any behalf."

*603] *Upon this section the question turns. The archbishop is directed "to confirm" "and to invest and consecrate," "and to give and use all such benedictions," &c. No description is given of any one of these three things. If he had asked, immediately after the statute passed, "How invest? how consecrate?" the answer would be, "As you did before the act passed, except where it specially provides to the contrary." If he had asked, "What will be the legal effects of investiture and consecration," the only answer would be, "the same as they were before." "What are my functions in investing and consecrating?" The same answer surely must be given; and, if the same questions were put as to confirmation, must the answers all be different? "You were a judge before; you are a minister now: you were bound to inquire and examine before; you can do neither now: you were bound to reject one whom you believed improper for the office before; you cannot do so now?" If such answers were given, might not the inquirer ask on what words in the statute they were founded? If there were no clear words, on what strong implication they rested? And would he not be entitled to demand the strongest implication before he consented to anything so seemingly unconscientious? Or could he think any implication strong enough if he found that he was still expected to proceed in this new thing, mis-called confirmation, according to the same judicial form, and still worse, with the same religious rites accompanying and seeming to sanctify it, in the house of God, as he had been accustomed to before, when it was no form, but all, in substance, which it assumed to be?

*604] *But if the words which close the sentence and refer to Rome be only held to override the words "confirm," "invest," and "consecrate," as they not unnaturally would do, not only this great difficulty is avoided, but a meaning is given to the whole which is perfectly consonant with the purview of the act, and, in addition, a great defect is removed from its provisions; for then it cannot be objected that the Crown may make any one a bishop—heretic, infidel, or bad liver—without reference to age, orders, or canonical qualifications of any sort. It can only do what the electoral body could have done before, however constituted, in all ages of the Church, subject only to the judicial inquiry of him on whom the Church, not the Crown, be it observed, had cast the most responsible duty of consecration.

I think it was felt in the course of the argument that, unless it was possible to separate the consideration of consecration from that of confirmation, a very great difficulty was cast upon the crown lawyers. I own I think that that separation cannot be made. I think that that difficulty cannot be removed. I would ask, then, any person of ordinary sense and conscientious feeling to read the order of consecrating bishops now, or the order of consecrating them in the time of Edward VI., nearer

to the period of the Reformation, of which we are speaking, which may be taken undoubtedly not to be a whit more stringent or more solemn than the rites of the Roman Catholic Church in the same respect, and let him tell me whether it is possible to suppose that the archbishop proceeding in that function of consecration proceeds merely ministerially.

The seventh section follows, with its penal clauses. It is divided into three parts: first the electors for not *proceeding to election, and signifying the same within twenty days; secondly, the archbishop or bishop for refusing, and not confirming, investing, and consecrating with all due circumstance, within twenty days after signification or presentation; thirdly, these, or any other person, for admitting, maintaining, allowing, obeying, doing, or executing any censures, excommunications, interdictions, inhibitions, or any other process or act, to the let of the due execution of the act, and their aiders, counsellors, and abettors; incur the penalties of *præmunire*. [*605]

In the two first cases, a time and a short time is set; and from the shortness of the time it is inferred that the acts to be done must necessarily have been such in their nature as might commonly be done within those short periods. This argument, however, assumes the nature of the non-feasance which would bring a party within the penalties. If every, even honest, delay which overran the twenty days were conclusively a breach, there would be something in it; though even then it may well be supposed that, even as regards confirmation, the only one to which the argument applies with any force, ordinarily the process might be expected to close within that period, and as short a period as could reasonably be assigned we should expect to find allowed in an act, all through which the fear of process from Rome is most apparent. But in truth the argument falls to nothing, if in confirming the archbishop was engaged in a judicial act; for then I have no doubt, that, if, while honestly engaged in prosecuting it without delay, he was prevented from completing it within the time of the necessary length of the inquiry, he would have a perfect answer to an indictment. The *twenty days may have been quite long enough to ascertain whether he was wilfully and capriciously refusing to obey the statute: and in that sense I believe the limitation of time to have been enacted. [*606]

I have now very imperfectly, and very hastily, though on that account at the greater length I fear, examined this statute. In the course of the argument the phrase "Magna Charta of Tyranny" was used with reference to it, with a personal allusion, of course perfectly understood. According to my view, this term appears to me exaggerated. The statute in that view is indeed excessive in the measure of its punishment; but that excess may well be excused with reference to the usual standards of punishment in the age in which it passed, and by considering that it did but adopt a mode of punishment which it found in the statute book, appropriated as it were to offences of a similar kind, those, namely,

of improper communications with the See of Rome. It is to be remembered that, so late as in the last century only, the same punishment, with no such excuse, and only under the mad excitement of the moment, was awarded for frauds committed against the South Sea Bubble Act.^(a) But, if the statute be rightly construed by the Crown lawyers, then the phrase is, in my opinion, a perfectly just, a strictly measured one, not because it casts off the vexatious interference of Rome with a somewhat rough hand, or asserts the prerogative of the Crown in the nomination of bishops with over urgent severity, but because it bids freemen and Christians still to wear the garb of freemen, and use the most solemn ordinances of their religion, yet *bear an intolerable yoke on their consciences, *607] and profane those ordinances by the most barefaced mockery; because it commands the highest officers in our Holy Church to assume the form and countenance of judges, to hold the semblance of an open court, to invite opposers, and swear witnesses on the gospels, to pronounce a solemn sentence in the name of the Saviour, and yet tells them that all this is but shadow and sham, that they are but ministers and servants, with no more discretion, as to the acts they perform, than the merest slave of the most absolute master; because, worst of all, if worse can be, it compels them to summon their comprovincial bishops to aid them in consecrating, no matter whom, bad liver, heretic, Jew, or Turk, in violation of their own most solemn vows, against, it may be, their own deep convictions and most ascertained knowledge: it bids them in prayer and solemn hymn to invoke the presence of the Holy Spirit to this monstrous profanation; in the most awful language, to confer that immeasurable gift on the mocking infidel, it may be, before them, and to minister to him that rite from which on the morrow they would be bound in strictness to exclude him. And all this it bids them do, as it is said, without possibility of defence, with no plea that could be sustained in a court of justice in case of disobedience; and then strips them of the Queen's protection, forfeits their lands and tenements, goods and chattels, casts their bodies into prison for life, or during the pleasure of the Crown. As no infidel could contrive a more blasphemous mockery of religion than such a consecration would be, so it would puzzle a tyrant to invent a more cruel and disproportionate punishment. It is my consolation, and a *608] great one it *is, that I do not and cannot so interpret the statute. I do not believe, nor shall I, until I am told so by the highest judicial authority in the land, that we have such a law under which we live. I do not believe that in any age, or under any monarch, Lords and Commons of England would be found to pass a law with such enactments as these, under which such things could ever be possible. I cannot think that, for so many centuries, holy men should have been found, in unbroken series, content to lay on their consciences so heavy burdens. I will not admit that Henry 8 would have given the royal assent to such

(a) Stat. 6 G. 1, c. 18, s. 19.

a law, so understood. Tyrant though he was, strongly under the influence of passion, and ardently fond of power, so blind and inconsistent is man; he certainly thought himself a churchman in the highest sense of the word; he gloried personally in the title of "Defender of the Faith;" and it was only two years before the statute in question was passed, that he gave his royal assent to another in which he asserted that he "and all his natural subjects, as well spiritual as temporal, been as obedient, devout, catholic, and humble children of God, and Holy Church, as any people be within any realm christened."(a)

But it was said that the construction of the statute which I deprecate in such strong language (language I meant not to be too strong, but the simple statement of the ideas which it conveys makes it seem strong) only brings about in substance the same state of things as by law now exists in the realm of Ireland and in our colonial Church. As regards the latter, the argument *is wholly unfounded; the sees have been created in the colonies, and the bishops appointed, not under any [*609 acts of the legislature, but by the exercise of the Royal Prerogative alone; and the metropolitan is under no statutory compulsion whatever as to the consecration; it cannot be pretended that he may not exercise an entire, though of course responsible, discretion as to the performance of that rite in any given case. And, as to Ireland, the argument, to have any weight, must assume the crown lawyers' construction of the statute. If the consecration be not a ministerial act under the statute of Elizabeth, but the metropolitan is at liberty to act according to his conscience, and will incur no penalties if he only refuses to consecrate where the canonical unfitness of the appointed makes it right and proper that he should decline, then the legal condition of the Irish branch of the Church is not in any way to be pressed as an argument against the rule; while it is obvious, on the other hand, that the revival in the same year of the statute of Henry which gave both *congé d'élire* and confirmation, and the non-revival of the statute of Edward which had taken them away, furnish some argument, for I do not rely on it strongly, for my interpretation.

Upon what remains I shall say but a very few words, though it is a part of the argument very important, and as I think equally strong; I mean the form of proceeding in confirmation. Looking at the traces which may be found in the books cited, it seems to me clear that we have now effectually the same form as obtained before the Reformation; and, if so, the form probably which obtained from very early ages. But the dilemma is this: either the form is thus ancient, or *it ob- [*610 tained almost immediately after the Reformation. If the former, what weight does it not add to the whole evidence of facts down to that event? If the latter, will any one assign a plausible reason for the inventing a procedure so solemn, so judicial in all appearance, so full of religious ceremony, if the process itself were but a shadow?

Will any instance be produced in history of great and grave functionaries, such as archbishops and bishops, setting about to contrive, or allowing to proceed, or taking part in enacting, such a ridiculous and at the same time profane mockery? I believe a parallel could not be produced.

It was urged in the course of the argument that confirmation might be a substance, but that the form was immaterial; that it was merely the mode by which the archbishop was to satisfy his own conscience of the fitness of the candidate; a mode, by the way, of putting the argument somewhat destructive of other parts of it in regard to consecration. Originally, the confirmation may have been uncertain as to form; but it seems early to have grown into a certain established course of procedure; and analogies will supply themselves immediately to the minds of lawyers, drawn from what has happened in regard to many of our own legal proceedings. Those forms, when established by usage, become binding; and the archbishop, even if it be a mode only of informing his own conscience, must inform it now in the mode prescribed. For he, be it always remembered, is not the only person concerned. The bishop elect, though not originally interested in the matter, and not supposed in the first place to have any personal desire to fill the great office to which he is called, as soon as he is elected, by the agreement of all parties (indeed *611] his *interest was much pressed in the argument), comes to have a direct and certain interest: he has not only a substantial and real interest, but he clearly has an interest of which the canon law took notice; because, unless he had been a party to the proceeding below, he could not have become, as he appears to have been in repeated instances, the party appellant at the Court of Rome. The Church had yet more urgent rights: and justice requires that such a proceeding as this, whether in fairness to the bishop elect or in fairness to the Church concerned, should be open and governed by certain definite forms; for all lawyers must admit that it is by forms in a court of law that rights are substantially protected. If, therefore, this was in the first instance a proceeding that might have assumed any form, or at first was governed by no form at all, yet if for at least three hundred years it has taken a particular shape, that shape judicial, that proceeding carried on in open court, and parties summoned to make their appearance in that place, then, according to that proceeding, by that form, and in that open court, I conceive the archbishop is bound now to proceed.

It was urged again that there was a total want of instances, since the Reformation, of the rejection of any bishop elect; and I would rather make that admission in the fullest terms, than stand upon any of the cases about which contest was made in the course of the argument. It does not appear to me that any one of them was made out in so satisfactory a manner as to entitle the Court to found its judgment upon it. But what is the weight of the observation, after all? That it introduces some difficulty into the case, that it gives those who oppose this rule

some ground to stand upon, *I admit most freely; and it is an admission that I can make with perfect safety; for I am not con- [*612 tending that this case is altogether free from difficulties. After all, however, set against that the mere existence of this form during the whole of that time, and consider the circumstances which may very reasonably be taken into the account to explain why there may have been no substantial appeal made, it seems to me that that argument is not entitled to very much weight.

For all these reasons, thus imperfectly expressed, not intending to pass over entirely any of the difficulties presented, and yet feeling that I have been compelled to do but little justice to some parts of this great case, it seems to me upon the whole that this rule ought to be made absolute.

PATTERSON, J. I do not propose to enter into a full examination of the various passages which were cited from the works of writers on the canon law, as well English as foreign, from the canons of general councils held at different times in the Christian church, and from various authors touching the subject of confirmation of bishops, which were very properly brought before the Court in the course of the argument. They appear to me to have established satisfactorily that in all Christian countries, in England as well as others, wherever a bishop was elected from the earliest times until the passing of stat. 25 H. 8, c. 20, whether by the people, by the clergy and people, by the clergy as a body without the laity, or by chapters or convents, that election required to be afterwards confirmed in order to perfect it; that such confirmation was the act of some spiritual superior, and was a judicial and not a *ministerial act, one which involved an inquiry into the regularity and [*618 sufficiency of the election, and into the *qualifications* as well as the *identity of the person* elected, and, coming after and by way of review of the election, cannot properly be said to have been a part of the election itself.

Such confirmation was obviously most requisite in the case of a popular election; but it was also very important when the election was confined to a smaller body. Without the control afforded by it, great danger would have been incurred of the introduction of very unfit persons into the sacred office of bishop, the mischief of which is obvious. All Christian people were interested in various degrees in preventing such mischief; and, therefore, when the act of confirmation was to be performed, all persons were cited generally, as well as those who had any particular interest specially, to come forward and state their objections, if they had any, to the election. Such citation appears to have been used in this country at an early period, though the precise date does not appear, and to have been in use and well known before the time of the passing of stat. 25 H. 8, c. 20, and to have continued to be used up to the present time. Whether it was introduced into this country from the

canon law, or how far the canon law as to confirmation was adopted in this country, whether altogether or in part, I do not think it necessary to inquire. It is sufficient for the purpose of arriving at a true construction of stat. 25 H. 8, c. 20, upon which this case depends, that, before and up to the time of the passing of that act, the election of a bishop in this country required to be confirmed by a spiritual superior, whether *614] the pope or the metropolitan, *who, anciently at all events, had the right; that it was a judicial act, and all persons were cited to come forward, which citation had been long in use.

Several instances of the Archbishop of Canterbury having refused to confirm elections of bishops in this country and rejected the persons elected were cited from Wharton's *Anglia Sacra*; in which instances the objections were, not merely to identity, but to qualification, and the elections were annulled by the authority of the metropolitan. They were all prior to stat. 25 H. 8, c. 20: and the elections at those times were real and free elections under a *congé d'élire* granted by the Crown, which, however, did not state who was to be elected, and was a matter of strict right according to the statutes of this realm, having been reserved only as an acknowledgment of the foundation and patronage of the Crown when the freedom of election was conceded to the chapters. The Crown, it is said, used to recommend some person to be elected, and influence the elections; but there was no power in the Crown to compel the election of any particular person, nor any legislative enactment restraining the freedom of elections. Therefore, the annulling of any such election by the archbishop or the pope, when the act of confirmation came to be performed, could not in any way trench upon the prerogative of the Crown.

The authorities from the Year Books, cited by the Judges in the case of *Evans v. Ascuthe*, Palmer, 457, (d) show that confirmation was an essential and necessary act; so much so that a bishop elect was not so completely in his office before confirmation as to occasion an avoidance *615] of any preferment that he had before; and the reason given is, because confirmation might be refused, and so the election vacated; and it is remarkable that the Judges in that case, though they cited no authorities subsequent to stat. 25 H. 8, c. 20, for the position, manifestly considered the prior authorities as applicable in this respect since that statute.

Taking it, then, to be established by the authorities cited in the course of the argument, as I think it must be, that at the time of the passing of stat. 25 H. 8, c. 20, confirmation was a judicial act, I come to consider the provisions of that act. But, first, I would advert to the Statute of provisors, 6 stat. 25 Ed. 3, ss. 2, 3, which, reciting the mischief arising from the Bishop of Rome reserving to his collation generally and especially as well archbishoprics, bishoprics, abbeys, and priories, as all other dignities, enacts: "That the free elections of archbishops, bishops,

and all other dignities and benefices elective in England, shall hold from henceforth in the manner as they were granted by the King's progenitors, and the ancestors of other lords, founders of the said dignities and other benefices." And then it goes on to say: "And in case that reservation, collation, or provision be made by the court of Rome, of any archbishopric, bishopric, dignity, or other benefice, in disturbance of the free elections, collations, or presentations aforementioned, that at the same time of the voidance, that such reservations, collations, and provisions ought to take effect, our lord the King and his heirs shall have and enjoy for the same time the collations to the archbishoprics and other dignities elective, which be of his advowry, such as his progenitors had before that free election was granted, *since that the election was first granted by the King's progenitors upon a certain form and condition, as to demand license of the King to choose, and after the election to have his royal assent, and not in other manner; which conditions not kept, the thing ought by reason to resort to his first nature." The effect of which seems to be, in case of such reservations by the court of Rome, to revert in the Crown the right of collation, in the same manner as before free elections were granted; but in the case only of such interference by the court of Rome, establishing in all other cases free elections.

I would also advert to stat. 23 H. 8, c. 20, s. 2, which enacts, "That if any person hereafter named and presented to the court of Rome by the King, or any of his heirs or successors, to be bishop of any see or diocese within this realm hereafter" (which I apprehend to mean presented, or named after free election), "shall be letted, deferred, or delayed at the court of Rome from any such bishopric, whereunto he shall be so represented, by means of restraint of bulls apostolic, and other things requisite to the same; or shall be denied at the court of Rome, upon convenient suit made, any manner bulls requisite for any of the causes aforesaid, any such person or persons so presented, may be, and shall be consecrated here in England by the archbishop, in whose province the said bishopric shall be, so alway that the same person shall be named and presented by the King for the time being to the same archbishop." Nothing is said in this statute as to the precise manner and form of carrying it into effect, with respect to bishops.

Then follows the statute in question, 25 H. 8, c. 20. *Now, that statute recites stat. 23 H. 8, c. 20; and in the preamble of the third section it states the fact, "forasmuch as in the said act it is not plainly and certainly expressed in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm, and in all other the King's dominions." Then that section enacts, that no recourse shall be had to the see of Rome; and the fourth section enacts the manner of electing a bishop in this country, and proceeds to state that the King may grant to the dean and chapter of the cathedrals "a license under the Great Seal, as of old time hath

been accustomed, to proceed to election of an archbishop or bishop of the see so being void, with a letter missive, containing the name of the person which they shall elect and choose: by virtue of which license the said dean and chapter," "to whom any such license and letters missive shall be directed, shall with all speed and celerity in due form elect and choose the same person named in the said letters missive, to the dignity and office of the archbishopric or bishopric so being void, and none other. And if they do defer or delay," then it provides that the Crown may appoint by letters patent.

Here is an entirely new matter, as I apprehend, introduced into the proceeding of election, namely, the letter missive from the Crown; because, though before that time the letter missive went by way of recommendation, it is quite clear to my mind that that letter missive need not be obeyed, and that it was a mere request; that there was no legislative enactment by which the chapter would be compelled to obey and act upon it. It is here introduced; and the enactment is, that the electors shall elect the person named therein, and no other. No *618] words are added, as in other parts of the statute, "without suing or obtaining any bulls, letters, or other things from the see of Rome;" but it is simply, and directly, and absolutely, that they shall elect the person named, and no other.

I cannot doubt that the effect is to destroy the freedom of elections altogether; to render the elections as they are characterized in the repealed statute, 1 Ed. 6, c. 2,(a) and in the Irish statute 2 El. c. 4, "in very deed no elections but only by a writ of *congé dislier* have colours, shadows, or pretences of elections, serving nevertheless to no purpose." But I do not agree to the other part of the character given; "seeming also derogatory and prejudicial to the King's *prærogative royal*, to whom only appertaineth the collation and gift of all archbishopricks and bishopricks and suffragan bishops within His Highness's said realm." For it is plain that, before and up to the time of the passing of the statute 25 H. 8, c. 20, the collation and gift of archbishoprics and bishoprics did not appertain to the Crown, but they were filled up by free election, by the laws of the realm, till that very statute 25 H. 8, c. 20, otherwise provided.

The next steps after the election are enacted in the fifth section: "And if the said dean and chapter, or prior and convent, after such license and letters missive to them directed, within the said twelve days do elect and choose the said person mentioned in the said letters missive, according to the request of the king's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents; and that the *619] person so elected, after certification made," "shall be reputed and taken by the name of lord elected of the said dignity;" "and

then making such oath and fealty only to the King's Majesty, his heirs and successors, as shall be appointed for the same, the King's highness, by his letters patents under his Great Seal, shall signify the said election if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishopric was void," "requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same." Then are added these words: "without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf."

The archbishop is thus required to confirm, invest, and consecrate the bishop elect, without suing any bulls, letters, or other things from the see of Rome. But he is not required in express terms to confirm and consecrate without any inquiry or any known and accustomed forms of proceeding. The statute is silent as to the course and form of confirmation and consecration.

If the statute had provided that the election should be by *congé d'élire*, "as of old time hath been accustomed," and had not introduced the new matter of the letter missive, I apprehend that no doubt could have been entertained but that the election would have been free, and the confirmation and consecration must have been also, "as of old time hath been accustomed," and that the confirmation would have clearly been a judicial act; so that it will be most important to consider what is the effect of the provisions respecting the letter missive, [*620 not only on the election, but on the confirmation. Those provisions convert the election into a virtual appointment by the Crown; preserving, however, the form of election, and making it a mere form. Do they, therefore, make the confirmation also a mere form? It is contended that they do, not by reason of the words actually used respecting confirmation, but because of the words, "then their election shall stand good and effectual to all intents:" and so the refusal of confirmation cannot effect or annul the election in any way. I am not sure that such is the effect of those words; they may mean only that the election shall stand good and effectual to all intents as an election, just as it would when the election was free; subject, nevertheless, to the same consequences of not being confirmed. But, if the words mean more, and the election is to stand good and effectual although not confirmed, still the statute has made no provision for the case of a refusal by the archbishop to confirm, by authorizing the Crown to direct other bishops to confirm, or in any manner whatever to perfect the election, and carry it on to confirmation and consecration; and has therefore, in some sense, left it in the power of the archbishop to render the election inoperative, though perhaps at the risk of his incurring the penalties of *præmunire*. It is surely a

much more reasonable construction of these words of the statute, taken by themselves, to hold that the legislature intended the ultimate perfection and consummation of the election to depend on the confirmation, though, as an election, it is made good and effectual to all intents; especially since, on *refusal of the dean and chapter to elect, it is *621] provided that the Crown shall nominate and present by letters patent, to be made to the archbishop; and that in that case the archbishop shall, with all speed and celerity, invest and consecrate the person nominate and presented by the King. No mention is made in such case of confirmation. The Legislature seems to have considered that confirmation was unnecessary where there had been no election, but the Crown had nominated and presented by letters patent. And this is not an oversight, as I apprehend; for in the Irish statute 2 EL. c. 4, which abolishes election, even in form, altogether, and makes the appointment always by letters patent, no mention of confirmation is made from the beginning to the end of the statute.

Hence, however, arises another argument; and it is contended that, as the Legislature treats confirmation as unnecessary where the Crown appoints the bishop directly and avowedly, namely, by letters patent, it never can have intended that confirmation should be necessary as a judicial act where the Crown appoints the bishop indirectly and circuitously through the medium of a pretended election by the dean and chapter; therefore that the confirmation mentioned in the statute must be taken to be a ministerial act, and a mere form; that the form of confirmation was preserved because the form of election was; but neither was intended to be real or more than shadow.

It is difficult to see why confirmation should be necessary when the Crown appoints indirectly, if it was not considered so when the Crown appoints directly, and if it was right to omit it in the one case, why it *622] was not right in the other. It is vain to *conjecture the reasons which actuated the Legislature at that time; and I do not pretend to reconcile or to account for all the provisions of this statute. Looking at the words used, I see nothing which imports that the confirmation and consecration were to be mere ministerial forms and shadows; they are both required in one and the same sentence, and in the same language. I cannot bring myself to believe that the Legislature of this country could ever intend that the solemn act of consecration should be a mere form and shadow; and, if not, neither can confirmation be so; for one and the same interpretation must be put on the language which is applied equally to both. As to consecration, indeed, no previous form of inquiry is stated to have been used, like that in case of confirmation; nor am I prepared to say any was necessary. The archbishop, where he had confirmed, would have already inquired; and, where after this statute (which would rarely happen, indeed, no instance has been cited in which it has ever happened) the Crown appointed by letters patent, he

would in general be able to inform himself, without any public inquiry, as to the qualifications of the person nominated and presented by the Crown; and, if any lawful impediment to the consecration came to his knowledge, I cannot believe that the Legislature intended to force him knowingly and without regard to such impediment, to perform the solemn act of consecration.

The statute, as I have already observed, directs letters patent from the Crown, requiring the archbishop to confirm the election, and consecrate the person elected, without suing or obtaining any bulls, letters, or other things from Rome. The confirmation and "consecration" [*623 contemplated by the Legislature seem, therefore, to be such (those words being added, "without any suing, procuring, or obtaining any bulls") as would formerly have required to be sanctioned by bulls from Rome, and as would be directed by such bulls; and can it be doubted that the bull for confirmation would have directed a judicial act?

I am compelled, in construing this act, either to suppose, without any express words to warrant that supposition, that the Legislature meant to carry the form and shadow, which by express enactment was introduced into elections, also into confirmation, or that it meant to require confirmation as a judicial act, such as it was before the statute, where there was a form of election, where the appointment by the Crown was through the medium of that form, although it did not require it where the appointment by the Crown was direct. I cannot feel myself warranted in attributing to the Legislature the enactment of mere form, shadow, and pretence, beyond what the very express words compel me to do; and I feel bound to construe the words which are used according to their known and received meaning, if by so doing no contradiction or absurdity is involved; especially if such construction be, as I think it is, more reasonable, though I cannot altogether explain the reason of the distinction as to where confirmation is required and where it is not.

It seems to me, therefore, that the archbishop is required by the fifth section to confirm the election, to use the words of the fourth section, "as of old time hath been accustomed;" that is, in a judicial course and with proper inquiry.

But the seventh section, containing the penalty of **præmunire* [*624 against the dean and chapter for not electing and signifying the same within twenty days, and against the archbishop for not confirming and consecrating within twenty days, "or else if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of due execution of this act," remains to be considered.

I would observe, first, that I do not think this clause at all affected by stat. 1 El. c. 1, s. 82. It seems plain to me that that section operates only to prevent the repeal of sect. 40 of stat. 1 & 2 Ph. & M. c. 8,

which enacted the penalty of *præmunire* against persons attempting to disturb the grants made by Henry 8 of the lands of monasteries, and has no bearing on the present question.

It has been much doubted whether this penalty in the seventh section applies at all, except where something is done or omitted to be done in consequence of communication with the see of Rome. As far as regards the latter part of the clause, as to admitting censures and so forth, I see much reason to think that doubt not without foundation; for it is observable that all the words used are indicative of processes not used in our courts of law, but in the canon law and the ecclesiastical courts. But I do not think it necessary to determine that point; for I think the language clearly applicable only to some extrinsic coercion used by another, whoever that might be, towards the dean and chapter or the archbishop, and submitted to by them, and not to the exercise of any jurisdiction or authority of their own which they lawfully have; and I have *625] already stated *that I think the archbishop has lawful authority and jurisdiction to act judicially in regard to confirmation under the provisions of this act. With regard to the earlier part of the clause, the words at first sight seem to import that the penalty is incurred absolutely, if the archbishop shall refuse and do not confirm and consecrate within twenty days; and in argument these words were brought to bear upon the construction of the fifth clause, because it was said that a judicial inquiry could not be conducted in so short a time as twenty days in most cases, and therefore that no judicial inquiry could be intended. I do not think that the words here used necessarily lead to any such consequence.

It is observable that in the fifth section nothing is said about the time of confirming and consecrating; it is only said that the King shall by his letters patent signify the election to the archbishop, requiring him to confirm and consecrate (it is not even said "with all speed and celerity," as it is in the case of letters patent nominating and presenting), without suing to Rome for bulls. Whether that is a mere oversight or not, I am sure I cannot tell; but certain it is that in this statute, where there has been an election by the dean and chapter, and where there are letters patent directed to be sent from the Crown requiring the archbishop to confirm, it does not say, "with all speed and celerity," or within any time; but it goes on to say, if the dean and chapter shall refuse, the Crown shall appoint by letters patent to the archbishop, requiring him to confirm and consecrate with all speed and celerity. The seventh section then enacts the penalty, if the archbishop shall refuse and do not confirm within twenty days. I apprehend that the true meaning is, if he *626] *shall refuse, and do not confirm within twenty days, *without lawful cause*. All statutes enacting penalties must be construed strictly: and, whenever a penalty is attached to the refusal to do any act, be it judicial or ministerial, I apprehend that the refusal must be without

lawful cause or excuse, the proof of which may perhaps lie on the party refusing, but which, being proved, would be an answer to any proceeding for the penalty. What would amount to lawful cause or excuse in the case of the dean and chapter, it is unnecessary to inquire; but it seems to me that, in the case of the archbishop, the pendency of a judicial inquiry, if it be such, would be lawful cause, as regards the time of twenty days, as much as illness either of the archbishop or the bishop elect: and a *bonâ fide* decision of the unfitness of the person elected after judicial inquiry would be lawful cause, as regards an ultimate refusal to confirm. If, therefore, I am right in my construction of the other parts of the statute, and confirmation be a judicial act, I cannot see anything in the seventh clause which should prevent its being so, or subject the archbishop to the penalty therein contained, if he proceeds *bonâ fide* in regard to that judicial act.

It is said that so to construe the statute would be in violation of the prerogative of the Crown. I cannot feel that it is so; the prerogative of the Crown remains just as it was, in regard to what is to take place after election, though by the letter missive the power of the Crown in the election itself is materially altered. The construction which I put upon the statute does not derogate from or diminish the prerogative of the Crown, but only does not extend it. Neither does this construction give the archbishop a veto to the *appointment by the Crown; it only leaves him to exercise his spiritual duties as to confirming and con- [627
secrating in the ancient manner, and as in their very nature they ought to be exercised.

Again, it is said that no instance has occurred of refusal to confirm since the statute. That is a circumstance of considerable weight: and, if the proceedings towards confirmation used before the statute had been dropped immediately after it, I should have thought that a contemporaneous exposition which would have gone very strongly to show that confirmation was intended by the statute to be a ministerial act: but the contrary is apparent, and that, for some time after the statute, upon the proceedings towards confirmation, witnesses were examined, and a regular inquiry gone into, although in modern times no such instances are cited. The disuse of an authority or power, which any court by law has, will not destroy that authority or power, as was conceded in *Ashford v. Thornton*, 1 B. & Ald. 405.

The opinions of various writers collected in a recent pamphlet (a) were referred to in the course of the argument, by the counsel for the prosecutors of this writ. So far as they go, they appear to me to afford an inference that the general notion was, that the archbishop was bound to confirm under the penalty of *præmunire*. In *Brett On Church Government*, ch. xxi. p. 481 (2d ed.), it is distinctly so put; and, in *Mason's Vindiciæ Ecclesiæ Anglicanæ*, lib. iv. c. 18, the answer to a supposed

(a) *The Royalty of the Crown in Episcopial Promotions*: London, 1847.

question, what is to be done if the King, being deceived, appoints an unfit person, is, that on representation to the King no doubt he would
 *628] appoint another; whereas it would have *been a ready answer to have said, "the archbishop will refuse to confirm," if it had been thought by Mason that he had the power. If it is meant to be inferred that, from the time of the statute, the received opinion was that confirmation had become a mere form, it must have been known to all the different archbishops; and it is difficult to understand why the proceedings at confirmation were not altered in their form, so as to suit the altered nature of the act of confirmation itself. If it was known to be a ministerial and not a judicial act, then, from the time of the statute to this day, a solemn mockery has been knowingly gone through at every confirmation, the whole forms of which are assuredly those of a judicial and not a ministerial act. Too much stress ought not to be laid on the use of particular forms; but any one who reads the account of the proceedings on confirmation given by Bishop Gibson in his Codex,^(a) and which confessedly have been constantly used, and were used on the present occasion, cannot but see that the citations, the summaria petita, the decree itself, and all the steps, which I need not detail, have the appearance, at least, of a judicial and not a mere ministerial proceeding. It is difficult to believe such a continuance of mockery and deception by so many and such persons, and for such a length of time, without, as it seems to me, any assignable motive. I cannot but think, therefore, that confirmation was not altered in its nature according to received opinion, but remained as before; and that the want of exercise of the right of refusal was from the necessity of so doing not arising.

Instances are mentioned, of Dr. Bunde and Dr. Samuel Clarke, in
 *629] which another course was taken to *prevent their being appointed: and that was a respectful and proper course, in order to avoid the necessity of any refusal by the archbishop: and in the reigns of Charles 2. and William 3, the Crown by its own act directed that commissioners should be consulted in the choice of bishops, which would obviate any difficulties. It seems to me, therefore, that no sufficient light is afforded by the events since the statute, to show that it really was intended to have the effect of altering the nature of confirmation which is contended for,—or which would justify me in putting a different construction on that statute from that to which a consideration of the words of it has led me.

It is said that confirmation cannot be a judicial act, because the archbishop acts in it by his Vicar General, whose office does not give him jurisdiction in contentious suits. I do not see that this alters the case. *Prima facie*, confirmation would not be contentious; and therefore the Vicar General would be a proper officer by whom the archbishop might act; but it does not follow that, if the proceedings became contentious,

the archbishop would be deprived of his authority because of the usual nature of the office of the person by whom he is acting. It is described in Oughton's *Prolegomena* xvi.: "*Ea quæ contentiosæ jurisdictionis erant non exercebat, id est, causarum inter partes, in foro contradictorio, decisionem (præterquam, quæ pro formâ solummodo ventilantur; utpote, negotia confirmationis episcoporum electionis, et similia) sed ea, quæ sunt officii meri, gerebat.*" This very passage, to my mind, conveys the idea that confirmation is not officii meri, namely, ministerial, but in its nature judicial, though usually pro formâ. Neither can I *doubt [680] that, if the archbishop be acting judicially in the matter of confirmation, he would have the same power of compelling the attendance of witnesses that any other court of ecclesiastical jurisdiction has. I do not lay stress on Dr. Rives's supposed opinion in the case of Bishop Mountague, opposed as it appears to be, if ever given, by one of Sir James Marriott; but the facts which then occurred militate against the supposition that the citation of opposers at confirmation was generally known to be a mere shadow; and so do the observations of the Judges in *Evans v. Aescithe*,^(a) to which I have already adverted.

Bishop Godwin, in his work, *De Præsulibus Angliæ*, in the Life of Mountague, p. 448 (ed. 1748), says, "*Illud autem memorabile accidit, eo die quo in Ecclesiâ Beatæ Mariæ de Arcubus, juxta solennem citationis formulam, episcopi jam jam confirmandi merces laicorum quoque examini subjiciuntur, adfuisse qui eum Arminianismi nescio ejus reum, et adeo Pontificiis faventem accusarent, eâque de causâ episcopatu prorsus indignum rejicerent. Verùm cum calumnias potius quam argumenta proferre viderentur, subsequuta est aliquandiu impedita confirmatio.*" This passage seems to treat the citation as a real, not a mock, proceeding. It appears to me, also, that what occurred in the case of Bishop Mountague must have drawn much attention to the proceedings upon confirmation; and that the citation would have been then discontinued if it had been thought to be a mere mockery and that the archbishop could lawfully omit it; much more if, as is now contended, he was precluded by stat. 25 H. 8, c. 20, from giving any effect to *it, and indeed from [681] making any inquiry. It is not as if no such question had ever arisen; but, when it did arise in the case of Bishop Mountague, I cannot account for the continuance of the citation afterwards, if it was considered really to mean nothing at all.

In the course of the argument a statute of Henry 5 was cited from the rolls of parliament,^(b) which is not found in the common collection, and which, after stating the schisms and disputes respecting the election of the pope, and that in truth the apostolical see was void, describes the mischief in this country from the inability of persons who were elected bishops to obtain confirmation, and enacts that, whilst the apostolical see is void, the archbishop shall confirm the persons so elected bishops, so as

(a) *Antæ*, p. 614.

(b) *Rot. Parl.* vol. iv. part 2, p. 71.

the King assents; and provides for the King's writ to them for that purpose; which is nearly, if not entirely, in the same form as that directed by stat. 25 H. 8, c. 20, requiring it to be done with celerity, and that the archbishop should do all things canonically necessary. The writ is to be found in Rymer's *Fœdera*; (a) and proceedings under the statute are to be found in Wharton's *Anglia Sacra* as to the confirmation of a bishop of Norwich in 1416, at which all opposers were cited in the usual way. (b) It is true that there are no penalties in the statute of Henry 5; but it directs the archbishop in quite as positive terms as the statute 25 H. 8, c. 20; and yet confirmation under it was plainly conducted as a judicial act and according to canonical forms.

*682] If, then, confirmation be still a judicial act, the next *question is, who are entitled to interfere and to claim to be heard in the course of the proceedings. Now, the words of the citation used since stat. 25 Hen. 8 are clear as to this point. It cites *all* opposers, any persons who may think proper to come forward, and they shall be heard: and this citation is stuck up in the church before the day fixed for confirmation, and is proclaimed also at the time of the confirmation. Whether this form of citation was in use before the statute of 25 H. 8, c. 20, I believe does not distinctly appear; but, if it was, the continuing it is strong evidence to show that confirmation was treated after the statute as a judicial act: and, if it was not in use before the statute, the making and introducing it afterwards is perhaps still stronger evidence to the same effect. But that some citation to the same effect was always used in this country and under the canon law is, I think, clearly established. And it seems to me that I am not justified in saying that it was always a mere delusory form, though no particular instances are shown of opposers actually coming forward and being either received or rejected. Bishop Fell, however, in his work published in 1669, speaking of confirmation, says, "*Nemine comparente (quod tamen non semper evenit).*" (c) Now it seems difficult to say that the Vicar General after such a citation could be justified in refusing to allow any person, who came forward with objections by way of opposition in proper form, to appear and offer those objections, unless he was precluded from doing so by the statute. If the ordinary and accustomed mode of proceeding *683] was to make such citation *bonâ fide*, the *archbishop or the Vicar General could not of his own authority alter the mode of proceeding, any more than this Court could refuse the wager of battle, whilst it by law existed; although the permitting all persons to appear and object under that citation may be very inconvenient and even mischievous. I would by no means be understood as expressing any approbation of such a mode of objecting in the present state of society. Nor did the Vicar General act on any such view, as I understand: but he

(a) Vol. iv. part 2, p. 156.

(b) Wharton's *Anglia Sacra*, vol. i. p. 417.

(c) See *antâ*, p. 546.

refused to allow the objectors to appear at all, holding that the statute in effect took away any power or authority in the archbishop or his vicar general to hear any objections at all. In this, as at present advised, I am of opinion that he misconstrued the statute, and declined a jurisdiction which he had by law, and therefore which he was bound by law to exercise: and, as all persons were cited to appear, all those who offered to appear and were not allowed to do so, and certainly and more particularly two of them who are beneficed clergymen in the diocese of the bishop elect, are aggrieved by such refusal, and ought to have some remedy.

Is then the writ of mandamus the proper remedy? No other is shown. I should doubt very much there being any appeal from the archbishop in a matter of confirmation, under any circumstances; but, where a party has not been allowed to appear in Court at all, he cannot be in a situation to appeal.

Again, here is a declining of jurisdiction by misconstruction of an act of parliament; in which case a mandamus was held to lie in *Rex v. The Justices of Kent*, 14 East, 395, 397. *That was the case of a person who applied to the Court of Sessions to do that, under an [*684 act of parliament, which they thought the act did not authorize them to do; and so they refused to act; and the mandamus was granted to put them in motion, but not directing them how to decide. Here the parties applied to oppose that which, but for stat. 25 H. 8, c. 20, they would undoubtedly have been entitled to oppose: they are refused on a wrong construction of the statute; and the thing which they were entitled to oppose is done. The principle is the same, though the facts are different. It is the misconstruction of a statute, and the declining to exercise a jurisdiction which belonged to the Court, which will render the confirmation void, if it be void, and not merely an erroneous decision as to admitting allegations, as in *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 544, or wrongly admitting or rejecting evidence, or any other wrong conclusion, if there has been a hearing: for in such cases this Court is not a court of error and does not interfere; *Regina v. The Justices of Kesteven*, 3 Q. B. 810. However, Mr. Justice HOLROYD, in the case of *Rex v. the Justices of Carnarvon*, 4 B. & Ald. 86, intimated that, if the Court of Sessions had heard one side and altogether refused to hear the other, he should have thought it the same as if the case had not been heard at all, and that the mandamus ought to issue, though the Sessions had come to a decision. Also, in *Rex v. The Justices of Cumberland*, 4 A. & E. 695, where a complaint was made by an overseer against a man for not maintaining his wife, the man denied her to be his wife, and produced receipts for money paid by him to the overseer, in which the woman *was treated as not his wife, on which the overseer offered to prove a marriage between the man and woman [*685

at Gretna Green, but the justices refused to receive it, and dismissed the complaint, this Court granted a mandamus.

These cases are not precisely in point; nor were any cited that are so, either on one side or the other. That of the Bishop of St. David's v. Lucy is plainly not in point; for there both parties were before the Court, and the question was as to admitting certain allegations, a matter which the Court of King's Bench could not determine upon or interfere with. Here the parties are not allowed even to appear, and that on the misconstruction of an act of parliament.

If, indeed, by the known practice at confirmations at all times, independent of the supposed effect of stat. 25 H. 8, c. 20, the citation of opposers, in whatever form couched, was always a mere idle ceremony, meaning nothing, and not intended to be acted on by those who made it, like the challenge of the champion at the coronation, and the Vicar General had rejected the parties applying to be heard on that ground, the case might have come within the authority of *Ex parte Smyth*, 3 A. & E. 719. But, if I understand the affidavits right, it was not so put by the Vicar General; but his rejection proceeded on the construction of the statute. I think, therefore, as at present advised, upon the principle acted on in cases of mandamus, that this confirmation cannot be held good, and that a writ of mandamus may and ought to issue.

*636] A question was brought before the Court, as to the *effect of the Church Discipline Act,(a) which limits prosecutions to two years, and directs the mode of proceeding. Had this been an attempt to prosecute the bishop elect for some supposed offence committed more than two years ago, in a way not authorized by that act, of course it could not be maintained; but it is nothing of the sort. It is an application to be allowed to appear and be heard according to the citation proclaimed by the Vicar General, not by way of prosecution against the bishop elect, but to show that he is not entitled to be confirmed in that election, on account of some supposed objections: I do not see that the Church Discipline Act touches the question at all.

In coming to the conclusion at which I have arrived, I have entertained very great and serious doubts: and my mind has fluctuated, during the argument and since, very much, and more particularly with regard to the power of this Court to grant the writ of mandamus under the circumstances. And I cannot but feel very diffident in my opinion, considering that my lord and my brother ERLE take so entirely different a view of the subject. I think that it is admitted, on all hands, to be one of very great importance and difficulty, and for that reason very fit, as it appears to me, to be put into such a shape as to enable the unsuccessful party here to take the opinion of a court of error. That power of bringing a writ of error having been granted by a recent act(b) has materially affected the duty of this Court, as it seems to me, in regard to writs of mandamus.

(a) Stat. 3 & 4 Vict. c. 86.

(b) Stat. 6 & 7 Vict. c. 67, s. 2.

Formerly, when the decision of this Court was final if the facts were not disputed, and *the law was fully argued on the motion for the writ, [*637 no advantage was gained by delaying the decision upon that law until a writ had issued and a return been made. But now, by refusing the writ, we prevent the party applying for it from having the benefit of the recent statute; whereas, if we grant it, the other party has still that benefit. And therefore, as I think, we ought now to grant the writ as a general rule, unless we are quite clear that it cannot be sustained.

I am fully aware of the agitation of men's minds, and of the strong feelings which are said to attend this case, and doubt not that much inconvenience would accrue from the ultimate decision of it being delayed: but I do not see that those are sufficient reasons for not putting the case into such a shape that recourse might be had to a court of error.

I have not alluded, in the course of my observations, to that part of the affidavits which discloses the nature of the objections intended to have been urged by the prosecutors of this writ. I do not think it at all necessary to do so. I consider the miscarriage to have been in refusing to allow the parties to appear and bring forward their objections, which is wholly beside the question as to the nature of those objections. Upon them it would have been the duty of the Archbishop or his Vicar General to have determined: and this Court would not attempt to interfere with that determination. The present question must be, as I think, wholly independent of who the person is who has been elected bishop, and what are the sort of objections intended to be urged against him. It is a question applicable to every case of confirmation of a bishop as well as this.

*Upon the whole, though with most unfeigned diffidence, I am of opinion that this rule for a mandamus ought to be made [*638 absolute.

Lord DENMAN, C. J. This is an application for a mandamus to the Archbishop of Canterbury and his Vicar General to hear certain reverend gentlemen who appeared and claimed to be heard as opposers of the confirmation of the Bishop elect of Hereford. Their affidavit states, in substance, that a citation was issued requiring all opposers to appear; that they did appear accordingly with their objections, and attended by counsel; and that their counsel were not permitted to do more than argue in favour of their right to be heard; after which, the Vicar General proceeded with the confirmation, and declared that no opposers appeared, and pronounced all opposers contumacious for not appearing.

They add that the opposition intended was founded on two books, written, printed, and published by the bishop elect, repugnant to the Articles of religion; and they contend that the confirmation which followed is, on this account, and by reason of this refusal, wholly null and void.

Various arguments were urged to prove that a mandamus would not

lie in this case, even though some wrong were done. I am clearly of the contrary opinion; and, even if I doubted of this, I should think it better to issue the writ, reserving the question of its validity, than by refusing it to run the risk of abridging the Queen's just prerogative, exercised by her in this Court, to insure the enjoyment of her rights in other Courts and on other occasions,—a prerogative not only important *639] to the dignity and power of the Crown, but *become necessary, particularly of late years, to enable her subjects to enforce their claims against each other.

But I advisedly abstain from discussing these several objections. I might fully excuse myself from doing so, after the very able argument of my brother PATTERSON, in which I entirely agree upon this point; and, also, because my judgment proceeds upon other points, to which, therefore, I will now direct my attention.

Furthermore, I am of opinion that there is a *prima facie* case of wrong. The previous citation for opposers to appear at a confirmation, and the proclamation at the time to the same effect, furnish to my mind some evidence that opposers had a lawful right to appear and be heard to make their objections: and, when opposers come, and are eager to state their objections, to stop their mouth at the very outset of the ceremony, and close the door of the Court upon them, is a practice reflecting no honour on the wisdom of those who framed it. The absurdity of these particulars can only be exceeded by the sentence of contumacy with which they close, solemnly pronounced on those who appear and press for a hearing, for their default in not appearing. This anomaly, however, has been deliberately gone through, and is distinctly avowed by persons entitled to our highest respect and almost unbounded confidence, by the venerable primate of the realm, a bishop during a quarter of a century,—an archbishop during much the greater part of that period,—who must have taken a leading part in the confirmation of almost all the reverend prelates who now adorn the bench,—one who, in trying times, has uniformly displayed, among higher qualities, the utmost prudence and moderation and care; his fine mind and highly cultivated under- *640] standing not *impaired by age, but matured by experience and reflection. The act complained of has proceeded upon the sanction and approval of persons most eminent in the law, and most conversant in these particulars, who were his Grace's immediate agents in excluding the complainants: and all these persons justify what they have done, not by any attempt to show that it is inconsistent with justice, reason, or propriety; for, on the contrary, they lament the continued adherence to a form which they admit to be strange and scandalous: but they rely on an express enactment of the law of the land, the statute passed in the 25th year of Henry 8, which stated that it had not before been plainly and certainly expressed in what manner and fashion archbishops and bishops should be elected, presented, invested, and conse-

crated within the King's dominions, and proceeded then fully to prescribe all the particulars by which a bishop was to be thereafter made.

The first step in this process, on the avoidance of a see, is the congé d'élire, accompanied by the letter missive, so often explained; then the form of election; then the certification of it, under the seal of the chapter, to the King, whereupon "he shall be reputed and taken by the name of lord elected of the said dignity;" then, after the oath of fealty taken, the "King's Highness, by his letters patents under his Great Seal, shall signify the said election" "to the archbishop," "requiring and commanding such archbishop" "to confirm the said election;" not to confirm it as of old time, not to follow any form of confirmation which had been practised up to that period, whatever that might be; but the command is "to confirm the said election, and to invest and consecrate the said person so elected *to the office and dignity that he is elected [641 unto." Upon which enactment the first observation that occurs to me is, that no particular form of confirmation is given, no reference is made to any antecedent practice.

Reference is next made to the statute of 23 Henry 8, c. 20 (cited in this statute of the 25th), entitled "An act concerning restraint of payment of annates to the see of Rome," but extended far beyond that object: for, after denouncing the former exactions of the Pope, as the means of delaying appointments made by the King, it enacted that, if any person hereafter named, and presented to the court of Rome, shall be there letted, deferred, or delayed from such bishopric, or shall be denied the requisite bulls, such person "shall be consecrated here in England by the archbishop, in whose province the said bishopric shall be, so always that the same person shall be named and presented by the King for the time being to the same archbishop:" being so named and presented, consecrated and invested, he shall be deemed and taken to be and obeyed as a bishop. The word "confirm" never once occurs in this statute, which was in force and is kept alive by stat. 25 H. 8, c. 20; so that any person delayed by Rome from his appointment to a bishopric, and afterwards named and presented by the King to the archbishop, is not thereby required to be confirmed at all, but must be consecrated on the King's sole nomination and presentation.

Another provision of stat. 25 H. 8, c. 20, was pressed as material to show that confirmation was intended to be ministerial only. If the dean and chapter refused to elect for twelve days, the nomination was in that case given to the King, without any necessity for confirmation.

*To prove the notions prevailing about this time on the same [642 subject, we were also referred to the act of Edward 6, which recited, with much disapprobation, the mock election under congé d'élire and letter missive, stigmatizing those proceedings as "colours, shadows, or pretences" "serving nevertheless to no purpose, and seeming also derogatory and prejudicial" (and, with deference to my learned brother, I

must say they do so seem, if the Queen had that power notwithstanding that election) "to the King's prerogative Royal, to whom only appertaineth the collation and gift of all archbishoprics and bishoprics" in England and Ireland, and gave the appointment to the Crown by letters patent. This act of Edward 6 was indeed repealed, and so was stat. 25 H. 8, c. 20, in the reign of Philip and Mary. Stat. 25 H. 8, c. 20, was revived in the reign of Queen Elizabeth: but this (it was said) could not have been from respect to the principle of confirmation, because in her reign the nomination of all the bishops of Ireland by letters patent was vested in the Crown, and for them no confirmation was required.

The statute in question was undoubtedly framed in that spirit of jealousy towards Rome which was severing one by one all the ties between this kingdom and that see. But neither King Henry 8 nor any other king was likely to leave the "manner and fashion" of making bishops, when he once set himself about it, imperfect for the time to come, when that was one of the professed objects of the statute, put forth in the preamble of the 3d section. And it was asked, whether such a King, in particular, was likely at the same moment to deprive the pope of his veto and lodge it in the hands of one of his own subjects? The only *answer to this pertinent question, if I understand it properly, I confess I could not hear without surprise and regret. As I caught it, it was a reflection, and a severe reflection, on that great father of the English Protestant Church, Archbishop Cranmer. I understood the solution of the difficulty to be, that the King knew how obsequious an archbishop he had in Cranmer, who would readily conform to any wish that the royal mind might conceive. Cranmer was not a blameless man, very far from it. Shortly before his death he betrayed a lamentable want of firmness,—not, however, greater than his who was selected from among the Apostles as the rock on which the everlasting church was to be built. Yet his noble bearing, when he met at last the death he had too much feared, might have been expected to protect his memory from general reflections like these. In a court of law, "*In quæstione legitimæ, et in judicio publico, cum res agatur apud*" "*judices, tanto conventu hominum ac frequentia, hoc uti genere dicendi, quod non modo a consuetudine judiciorum, verum etiam a forensi sermone abhorreat,*" (a) seemed a remarkable use of the opportunity afforded. In the presence of so many learned and faithful sons of the Church of England, I certainly did not expect to hear the name of Cranmer introduced only for such a purpose. I should have observed this, of course, not for the sake of any personal observation upon the very learned gentleman who uttered this sentence; but I do think that it shows an excitement of mind existing somewhere upon the present subject, whether in the client or the counsel, which makes it doubly our duty to take care

(a) Cic. Pro. Archia, 2, 8.

that we are not led away by the *impressions on their minds, or too ready to yield to that ecclesiastical authority which, in my [*644 opinion, justly and wisely, it has been the duty and the boast of this Court, in all ages, to watch with peculiar jealousy.

If Henry reckoned upon Cranmer as a mean and servile churchman, who would always yield to his caprices, he assuredly mistook his man. The archbishop more than once thwarted the inclination of his sovereign. When Anne Boleyn's fate was sealed, "Cranmer alone," (says Hume(a)) "of all the queen's adherents, still retained his friendship for her; and, as far as the King's impetuosity permitted him, he endeavoured to moderate the violent prejudices entertained against her." His long letter of remonstrance is preserved by Burnet;(b) and probably no surer method could have been found for exasperating a selfish monarch than to protect the Queen in her prosecution. Again: I would mention that afterwards, in 1539; when the Six articles were drawn up by a committee of the privy council appointed by the King, they met with Cranmer's vigorous opposition.(c) When they were afterwards brought into the House of Lords, there also he spoke against them, declining to obey the King's injunction to absent himself; and this at a time when the royal mind was bent on the extirpation of all doctrines differing from his own, by torture and death.

But, taking that expression in its milder sense, as only stating the King's hope that Cranmer would be willing to listen to his suggestion, Cranmer was not immortal, and other less friendly or less tractable *metropolitans might succeed him. Henry 8 knew the strength [*645 and obstinacy of religious faith from his own experience, having seen one of the most upright and virtuous of men, lately his own well beloved chancellor, lay his head on the block, rather than admit his supremacy. He had seen the power of eminent ecclesiastics both at home and abroad: he could not be ignorant of the past, but was probably as well acquainted with the time of Henry 2 and Thomas à Becket as with any other chapter of English history. Why, with full means of securing his own complete control over so capital a part of his government as the making of bishops, he should leave it in any degree to hazard, no ingenuity can discover a reason. And, besides, the Parliament itself, at its meeting, had expressed their discontent with the clergy, and especially had complained of the archbishops' courts, which they could feel no temptation to invest with any new jurisdiction.

These considerations are surely entitled to great weight, the whole argument on the other side resting on the single word "*confirm*" found in the statute. It does not, however, stand singly, but is joined with election, "to confirm the said election:" and these words plainly and

(a) Hist. Engl. (H. 8), ch. xxxi. vol. iv.

(b) Hist. Reform. Part I. Book III. Vol. 1. p. 364 (Ed. 1816).

(c) Ib. pp. 465, 466, 482.

more naturally describe a duty connected with an election, necessary to be performed by somebody, which appears originally to have devolved on the metropolitan.

In the times when the election was real, two things required to be certified to the high functionary who had to confirm it, not having been then and there present: first, that the election was duly made; secondly, the identity of the person who brought the certificate.

*646] *The office of ascertaining these matters was, perhaps, scarcely befitting the dignity of the archbishop, if that had been all; but his presence, his benediction, his gracious reception of his new colleague in the sight of the people, tended to secure their respect and obedience. Those who maintain this rule say that he had much more to do, to hold a Court for summoning accusers from every quarter, and for hearing every kind of objection to the eligibility of the lord bishop elect: and the question is, not whether he had authority to confirm or not, and to exercise some discretion, but whether he was bound to open a court of this description for the purpose first described: such is the duty now sought to be imposed on the Archbishop of Canterbury. I would ask, is there any necessity for this? That person was formerly ordained a deacon, more lately a priest: the whole world were called upon at those two several periods to pronounce whether they suspected him of any great crime or offence. If they did on his first ordination, that was delayed until he was clear of the charge. The same process was again gone through when he was made a priest. All might come to make particular accusations, if they thought proper, of any great crime or offence: and then that was cleared, or the ordination could not proceed. This person then has already twice undergone, every bishop has undergone this ordeal; and the ordaining bishop was twice enabled to institute all needful inquiries into his life and conversation. But the deacon has become a priest, and the priest become now the lord bishop elect, bearing the additional testimony of the election itself, by parties competent to judge of his fitness in all respects; or, since that statute, he *647] brings his nomination by the *Crown. Is that to pass for nothing as a testimonial? Why is the archbishop to suspect, and to commence any inquiry? And, much more, why is he to call upon all mankind to question the confirmation? If the election were in the people at large, every one voting according to his opinion of the candidate, no instance occurs of such a court of accusation being held. But here the election had passed away from the people, and vested for ages in the dean and chapter, who have presented the bishop elect for confirmation, under the express recommendation of the Crown.

The limitation of time imposed by the statute on the two great processes of election and consecration seems to afford material support to this view. The election must be made in twelve days: if not, the king may nominate. The archbishop is enjoined to consecrate in twenty

days, which would suffice for the preparation and transmission of documents from the more distant parts of the country. Again, the election is reduced to a mere form, the appointment being both virtually and in terms to be made by the king. The consecration wears a more solemn aspect; the Book of Common Prayer prescribes the impressive forms with awful sanctions. The bishop, when elected, and his election confirmed, before receiving episcopal ordination, is to be called, tried, and examined: and the archbishop, after receiving him at the hands of two bishops, demands the king's mandate for his consecration. Certain oaths follow; then the litany; "then the archbishop sitting in his chair" shall put certain fixed questions to him that is to be consecrated, and to those fixed answers are to be given by him. The thirty-sixth of the Articles of Religion declares expressly that the *consecration shall be in that form, which shall be deemed perfect, and according to the [*648 law of God. The consecration therefore is said to be, like the election, little more than nominal; the one initiated by the dean and chapter, and the other consummated by the archbishop, but both in reality the acts of the King: and, if this be so, we are asked to discover some reason why the confirmation should be more real than these.

The answer attempted is that the word "confirm" had a known legal meaning in the time of Henry 8, and was used by the Legislature in its legal sense. After remarking that, though it might bear that sense, it did not bear it to the exclusion of any other, I will proceed, however, to inquire what was at that time the meaning of confirmation by the archbishop, and whether the gentlemen who come forward and contend that confirmation was understood to mean the power of holding a Court, with the duty of summoning all persons to come in and oppose the confirmation of the bishop elect, are right in so contending. The favour of his sovereign is supposed to place the lord bishop elect in no position analogous to anything I am aware of but that of a felon, upon whose trial the jury is charged; he has pleaded "Not guilty;" and forthwith all persons are invited by public proclamation, if they know of any treasons, murders, felonies, or other misdemeanors done or committed by the prisoner, to come forward and give their evidence. In that situation the bishop is placed by the favour of the Crown. The black catalogue of treasons, murders, felonies, and misdemeanors is made darker and more ominous by that word which has crowded with crimes the records of *mankind, the fatal and comprehensive description, [*649 heresy.

When engaged on this general subject, I think it necessary to re-assert what has so often been declared by our illustrious predecessors in this Court, and by the greatest writers on the English Constitution, that the canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country. Hence, rather differing from what I have heard to-day, I am of opinion that the burden c^d

proof rests on those who affirm the adoption of any portion of it in England. I thought of stating that, merely by way of protest, because some things were said at the bar which seemed to question so important a position. But I do not dwell upon it, not wanting that principle here, inasmuch as I am fully convinced that this practice has never existed at all authoritatively in this country: and for this I mainly rely on the arguments of those learned gentlemen who have supported the present motion: they have satisfied me that no such opposer ever has been heard on any such occasion: this fact I draw not from affidavits or documents; but the total absence of all affirmative proof of a proceeding extraordinary, so striking, and so affecting, that if it ever took place it must have been notorious, proves to me that it never took place; there is not, in my opinion, a trace of such proof; all records, historical and legal, present a perfect blank to our investigation of this subject. It was thrown out on the motion that such opposition had never been necessary before, as if none suspected of unsound doctrine had ever been raised to the episcopal office. What? During all the centuries that *650] Christianity has flourished in this country, not one *infected with heretical opinions or bonâ fide thought to be so tainted? Was there in those dark ages no spirit of persecution, no spiritual pride? But, supposing all to have been orthodox and universally admitted to be so, has no one ever been promoted whose piety and morals were not wholly above all exception? And, even assuming this, were there none capable of preferring a false charge? Was envy dead, was faction banished from the world? Where were the sons of Belial at that time? We know that the family is not extinct even now: and there never could be a field in which they could act with so much delight.

Observe what would happen. "Come forth and oppose the confirmation of the bishop elect:" such is the invitation of the public officer to the whole people, first pronounced in the church, afterwards ejaculated at the door. An answer would surely have been heard in some quarter: "Here am I to tell you that I remember the bishop elect at college some twenty years ago; and I recollect some irregularities of conduct which in my judgment unfit him for a bishop." A second says: "He is justly suspected by me of having but recently performed the church service in a state of ebriety." The charges may be rung on all those offences or defects which are blemishes to the episcopal character, all from which the pharisee blessed God that he was himself exempt. His mother's chastity may be impeached, or his own ill management of his son. The archbishop may deem the charges frivolous, or may know them to be false; he may think that they have been atoned for by a long life of piety and virtue; or he may know the accusers to be infamous and malignant, and utterly unworthy of belief. This, however, does not alter *651] his *duty: the inquiry must proceed; and, whatever the result, even if the confirmation is delayed but a day, some taint of

calumny may remain. But before these articles are well committed to writing comes the unfathomable charge of heresy, to be proved by extracts from books, or reports of conversations in their nature difficult to understand, remember, and report, and defying the most innocent man to answer them without the comparison of other passages, and the explanation that may take out the sting. If no other effect results, he must be a clumsy accuser who could not prolong the debate, so that the confirmation might be "letted, deferred," and "delayed" till the natural life of all concerned is closed, the see in the mean time remaining without a bishop, and the archbishop's whole time having been diverted from his high duties to this absorbing investigation.

The existence of this court being inferred, we are next to infer what its proceedings must be. This we derive from the citation of opposers, from the formula used in confirmation, and from the *schedula prima* exhibited by the proctor to the dean and chapter, who prays that their election be confirmed. This *schedula* is thus described by Bishop Gibson in a note to stat. 25 H. 8, c. 20, correctly copied by Mr. Stephens in his useful work on Ecclesiastical and Eleemosynary Statutes.^(a) "The said proctor, in the name of the dean and chapter, exhibiting the citation and return above mentioned; prays, that the opposers (if any be) not appearing, may be pronounced contumacious, and *precluded from [652 further opposition, and that the confirmation may be proceeded in; which is accordingly done by this schedule." A *summatoria petitio* is then presented by the same proctor, setting forth, among other things, the fitness of the person elected. A "*schedula secunda*: before sentence, a second præconization of the oppositors (if any be) is made, *ad fores exteriores ecclesiæ*, and (none appearing) they are declared contumacious, by a second schedule." In this court of confirmation then, which is turned by the argument into a court of opposition, it is absolutely taken for granted that no opposers will appear; and, if they do, no provision is made for their being heard, nor for what shall be done if they are heard; in truth, the non-appearance of opposers is as much a part of the proceeding as any other part of it, though the absurd form of pronouncing them contumacious is still preserved, perhaps through the jealousy of all change which has so often obstructed improvement, perhaps from another difficulty generally found in the way of reformation, because certain emoluments were earned by these idle ceremonies in each of their ten stages.

The evidence then that this opposition actually took place in the most ancient times is the very same as that which would prove its existence during the last three centuries, the fact of the proclamation made. But we know the contrary of this. In point of fact it has been mere matter of form during the whole of the latter period. Why not of the former? When the inadequacy must have always been as palpable as the iniquity

(a) The Statutes relating to the Ecclesiastical and Eleemosynary Institutions of England, &c. By A. J. Stephens, vol. i. p. 157, note (2). 1 Gibb. Cod. 110, note r (2d ed.).

of a proceeding which would have no certain results but uncharitable feelings and permanent disquiet in the church, why may not the ecclesiastical authorities *themselves, even in the most ancient times, *653] have the credit of tacitly surrendering so invidious and dangerous a power, or rather of refusing to adopt it? I will not say that any attempt to carry this supposed law into effect must have shown its impracticability and insured its rejection; but such a consequence is highly probable, and will best account for its non-appearance in the books.

But let us consider what a mighty edifice is sought to be raised on this naked word "confirm:" a court for the trial of unknown accusations, a judicial authority with process and practice of its own, the power of summoning and compelling witnesses, of securing respect to itself, and enforcing its orders and decrees. We are told that the archbishop has already a court so endowed, the Court of Audience, which appears in Lord Coke's enumeration in his 4th Institute,^(a) who never imagined, however, that it enjoyed those functions; yet all admit that this Court is possessed of no contentious jurisdiction whatever: the Vicar General presides there; but he is no necessary party to attend the confirmation of a bishop's election. That this Court has ever done what the archbishop is now required to do, no one has pretended.

That the appointment of bishops is vested exclusively in the Crown since the time of Henry 8, has been an universal opinion: that any opposer ever appeared, there is not even the shadow of a surmise. The records of the Court of Audience, and of all other ecclesiastical courts, are silent as to any attempt of the kind, with a single exception, to which I now advert. In 1628, Bishop Mountague was presented for confirmation: *according to custom, opposers were challenged; and contrary to custom an opposer claimed to be heard. He accused him of personal unfitness on account of the Bishop's theological opinions. The Vicar General, Dr. Rives, is reported to have refused him a hearing; but he is said to have grounded his refusal solely on the fact that the charge was not written, and then to have added that, if it had been written, he would have received it. The report is loose and unauthenticated. But, if literally true, to what does it amount? Of Dr. Rives we know but little, and that not much to his credit: but that which is said to be the law under circumstances not requiring judicial consideration is of little value. We have reason every day to repudiate the claim to make law by these *obiter dicta*. To me, however, it is tolerably clear that Dr. Rives was wrong, if the law is as the prosecutors of this rule suppose: nothing is said in that law about writing: the opposers might be unable to write. The person who wished to become an opposer to the confirmation of the Bishop of Manchester^(b) may now come forward for a mandamus, and argue that that act was null and void because his

(a) 4 Inst. 337.

(b) See, for a notice of this case, Mr. A. J. Stephens's Practical Treatise of the Laws relating to the Clergy, vol. II. Addenda, p. 1452, note (1).

opposition was shut out for the same bad reason. True: that right reverend prelate has been consecrated; but, if this court of confirmation is bound to hear all opposers, and the refusal renders the proceedings null and void, a very plausible foundation at least is laid for a motion for a mandamus in that case as well as this.

Some dicta were also cited from our law books, or rather one dictum in the case of *Evans v. Askuthe*, Palm. 457, (a) reported by Sir Gefrey Palmer and Sir W. Jones. A *distinction was taken between a bishop elect only, and a bishop confirmed. The Dean of York [*655 had been promoted to an Irish bishopric. In an interval of a year, which passed between his promotion and his confirmation, he had granted a lease as dean; and the question was, whether he was not incapacitated from doing so by becoming a bishop. The Court said he was not a bishop till confirmed: his title to the temporalities was but inchoate. The Court said; till confirmed he may possibly be rejected. (b) One of the Judges, in the course of the very extended argument, about half the length of that argument which we have lately heard, declared that opposers on the occasion are always summoned. This was perfectly unexceptionable; but it proves nothing to the point. His full title depends on the archbishop's confirmation; and in the course of that proceeding cproposers are called for: they were called for on the present occasion. Judge WHITLOCK, to show that the nomination was not alone sufficient, alludes to the possibility of its never being completed, and speaks of the ceremony, which plainly shows its imperfection; but he drops no hint that he had ever heard of an opposer being admitted; and so he leaves the case precisely where it was.

A useful pamphlet (c) was referred to by the learned civilian who supported the rule, a collection of extracts showing the sentiments entertained by canonists, divines, and others upon the royal prerogative, not by judges or students of either branch of law. The general scope of this little work is to illustrate the doctrine so clearly laid down in the 37th of our Articles, that the Sovereign has not the power of the keys, and cannot *confer orders; "The Queen's Majesty hath the chief [*656 power in this realm of England, and other her dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain, and it is not, nor ought to be subject to any foreign jurisdiction. Where we attribute to the king's majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended: we give not to our princes the ministering either of God's word, or of the sacraments, the which thing the injunctions also lately set forth by Elizabeth our Queen do most plainly testify: but that only prerogative which we see to have been given always, to all godly princes in holy Scriptures by God himself, that

(a) S. C. 1 (W.) Jones, 158. See p. 503, note (a), antè.

(b) Palm. 474.

(c) The Royalty of the Crown, &c. See p. 541, antè.

is that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers." The whole of this article must be taken together. There is no power of the keys; none to ordain, or to absolve: but there is a power over "all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal." This is the power claimed now to be exercised by the Crown, but which the Crown does not in effect possess if the archbishop can reject on opposition the bishop nominated by the Crown.

One of these extracts, taken from a dialogue between a Roman Catholic and a member of the Church of England, is remarkable. (a) The Catholic objects that under the Reformation there are as many popes as *657] kings, and that they do assume priestly power; but the *answer of the member of the Church of England is this: "The freedom of election doth not exclude the King's sacred authority, but force and tyranny only. If any unworthy person should be forced upon them against their wills, or the clergy should be constrained to give their voices by force and threatening, such an election cannot be said to be free. But if the King do nominate a worthy person according to the laws, as our kings have used to do, and give them authority to choose him, there is no reason why this may not be called a free election. For here is no force nor violence used." Then the Catholic proceeds: "But if the King, deceived by undeserved recommendations, should happen to propose to the clergy a person unlearned, or of ill morals, or otherwise manifestly unworthy of that function, what's to be done then?" The answer is: "Our kings" "are wont to proceed in these cases maturely and cautiously; I mean, with the utmost care and prudence: and hence it comes to pass that the Church of England is at this time in such a flourishing condition." Then he pursues it: "Since they are but men, they are liable to human weakness: and, therefore, what is to be done, if such a case should happen?" The answer is, "If the electors could make sufficient proof of such crimes or incapacities, I think, it were becoming them, to represent the same to the King with all due humility, modesty, and duty; humbly beseeching his Majesty, out of his known clemency, to take care of the interest of the widowed Church. And our princes are so famous for their piety and condescension, that, I doubt not but his Majesty would graciously answer their pious petition, and nominate another unexceptionable person, agreeable to all their *658] wishes. Thus a mutual *affection would be kept up between the bishop and his church. Thus I have showed you, that our kings have had a singular prerogative in the election of bishops: and now I am to prove that they had the same lawfully." Then King Charles 2 is alluded to in this pamphlet (b) as "having taken into his serious con-

(a) Lindsay's translation of Mason's *Vindicta Ecclesie Anglicanæ*, cited in *The Royalty of the Crown*, &c., p. 17.

(b) *The Royalty of the Crown*, &c., p. 28.

sideration how much it will conduce to the glory of God, our" (the king's) "own honour, and the welfare both of our church and universities, that the most worthy men be preferred and favoured according to their merits," and made an order that no secretary of state should move his Majesty on the behalf of any person whatever for preferment in the church without having the attestation of certain high persons, including the Archbishop of Canterbury and the Bishop of London for the time being. King William 3 made a similar order.^(a) But all this was without the least reference to the supposed power of the archbishop to examine and to enter into any proceeding at the time of the confirmation.

Bishop Gibson is mentioned in the same pamphlet; and he is a most remarkable authority in my opinion upon the subject. He was assailed by one of the most learned Judges who ever sat in this Court, Sir MICHAEL FOSTER,^(b) as one disposed to erect the church into an imperium in imperio; a sacerdotal order which must in time absorb all the other powers in the state. Gibson wrote his invaluable treatise, the great storehouse of ecclesiastical law; and from that, copying more ancient works, we derive all the evidence in favour of this application. Yet neither in that work nor in the course *of any proceedings taken by him [*659 does he assert the existence at any time of a power in the archbishop to defeat by such an inquiry as that suggested the nomination of the Crown.

There were certainly questionable appointments made of persons of doubtful orthodoxy; upon which it is only necessary to mention that no less than four times Bishop Hoadly gave all mankind the opportunity which resulted from this supposed course of summoning all to appear to make their opposition to his election on account of his opinions. No such opposition was ever made, though there might be, and very probably was, remonstrance against his appointment. Acting on this principle, too, Archbishop Wake remonstrated successfully against the promotion of Samuel Clarke, and Bishop Gibson against that of Dr. Rundle. From an able treatise lately published in a magazine, which is quoted in the same pamphlet,^(c) we are told that other sovereigns have consulted the archbishop before they promoted to offices of such high importance. But not a word is uttered to show that the archbishop could institute, and was bound to institute, an inquiry into the merits and demerits of the parties nominated by the Crown if any opposer thought proper to malign them at the time of confirmation.

I will not take an imaginary case, but will now advert to recent facts, as much a part of the history of our country as those which occurred in the time of Henry or Elizabeth. We know that, on the rumour of an

(a) *The Royalty of the Crown, &c.*, p. 30.

(b) 1735. In a pamphlet entitled "*An Examination of the Scheme of Church power laid down in the Codex*," &c. See Dodson's *Life of Sir M. Foster*, p. 13.

(c) *The Royalty of the Crown, &c.*, pp. 53, 54.

intention of the Crown to make a particular promotion, thirteen or fourteen right reverend bishops thought the appointment highly objectionable, and *addressed to the prime minister a strong remonstrance *660] against it. (a) They urged various topics—the probable discontent of the clergy, the recorded censure of one of our universities; but there was one topic, of far greater weight if this application is sustainable, to which they never adverted. They never warned the minister against the scandal of a public opposition at the time of confirmation, and the possibility of the Queen's nominee being rejected by the archbishop as a heretic. One of the most distinguished among them (b) warmly entreated, for the dean and chapter, that they might not be exposed to the peril of a *præmunire*, nor be called upon to elect one whom in their conscience they could not approve, since their rejection must be followed by that consequence. There was no such intercession in favour of the archbishop who might incur the same danger; no intimation that his Grace was not equally bound by the statute to confirm the person if he should be named by the Crown; no assertion of the danger and disgrace of an opposition so likely to arise in numerous quarters if one condemned by a convocation at Oxford should be elevated as a mark for animadversion in St. Mary's Church.

The archbishop is said to be converted into a mere machine by exercising the functions with which he is well contented. The phrase suggests to me the idea that our writ is sought for to construct a machine fraught with something like galvanic influence to revive a body which has been dead for ages, that it may perform some convulsive manœuvres for twenty days, and then relapse for ever into its dread repose. But *661] *this simile would imply that the form once had animation, which in my conscience I do not believe. It is not true to represent the archbishop as a mere machine, even if ministerial in the confirmation. I have shown some duty attaching to that office, not unlike that of a returning officer at a parliamentary or municipal election. This confirmation is necessary to give the new bishop all his rights. The archbishop is not unlikely to make some inquiry touching the bishop elect: and, if the result should lead him to the opinion that the appointment would be injurious, he may (as we have seen) advise the Crown in the first instance against issuing the *congé d'élire* and letter missive. Even afterwards, if he is since informed of facts which really convince him of such mischief, he may still resort to the Sovereign, and request to be relieved from the painful duty imposed by the statute. He may make it clear that the *congé d'élire* and letter missive were obtained in ignorance of the truth and ought to be set aside.

Extreme cases are ingeniously devised, but are not, and cannot with decency be thought, possible. But, even if the worst be supposed, if the

(a) See Mr. Jebb's report, &c., p. 6, note (e).

(b) See *antè*, p. 611, note (a).

Crown will persist against warning and remonstrance in nominating a bishop whom the metropolitan cannot consent to confirm without violating his conscience, his duty is clear. He must act as some of our predecessors in old times have done, when required to submit to dictation from the Crown: they forfeited their offices by not obeying: he must resign. From the course taken by the present Archbishop, I have no doubt that, after hearing of the objections notoriously made to the doctrine of Bishop Hampden, his Grace has formed the deliberate opinion that those objections have no solid foundation.

*I would ask whether it has been the opinion of any person, until within these few weeks, and until this unhappy controversy [*662 arose, that the absolute power of appointing bishops was not in the Crown. If it has only come into being since this very inflamed state of mind has arisen, surely we ought to regard all arguments upon the subject, drawn from remote antiquity and from obscure cases, with very considerable jealousy. When I heard Sir *Fitzroy Kelly*, with his impressive solemnity of manner, entreat that we would not expose the Archbishop to the mockery and shadow of having all the prayers recited, for the mere purpose of going through a form and acting a farce, I confess I hardly knew how to meet it. Are the dean and chapter to be treated as nothing? Do they proceed without prayer and without solemn ceremony? If they are required, notwithstanding all this, under the threat of penal consequences, to elect a particular person, and none other, the law which compels them may be an unreasonable, ill considered, and impious act of parliament that ought to be repealed; but why should there be more objection, on account of this solemnity being introduced, to the archbishop's share than to that of the dean and chapter? I forbear for obvious reasons entering more fully into that. I was reminded of the Roman augurs, who were said never to meet one another without laughing: (a) and I think that, if these gentlemen had induced us to issue this writ upon considerations of the incredible scandal and impropriety of using a solemnity upon such an occasion, they would have had some reason to laugh at our expense.

*I agree with my brother COLERIDGE that our time has been much too short to write as fully as might be desired, though not, [*668 I think, to form a satisfactory opinion. I have devoted as much time as I could afford to the task of placing my conclusions upon paper, that nothing might bear the least appearance of captious remarks upon what has fallen from my two learned brethren in their most able and well considered arguments. I abstain from all such remarks, with this single exception, that my brother COLERIDGE's argument has strengthened my opinion against the motion, by proving how the plain law of England may be put in hazard by learned speculations on obscure works of doubtful import anywhere, and of no authority here.

Now comes the question which presses most on my mind. Having

(a) Cic. De Divinit. II. 24, 51.

stated my reasons for the opinion which I deliberately form, and conscientiously entertain, that this never has been at any time the law of England, I must be of opinion that the Court ought to refuse the writ of mandamus. But upon that opinion I have had the greatest difficulty, and have felt the greatest possible hesitation in acting, because I feel the authority of my two learned brothers, and the ungracious appearance of refusing the opportunity of inquiry. In any ordinary set of circumstances, in the case of an enclosure, of a railway, or matter of property, we should have no question whatever that the doubt of any one on the Bench would have made further inquiry desirable. I should have instantly agreed. A writ of error would lie in that case to correct any opinion that might be shown on more discussion to be erroneous. But every judge must act on his own conviction. I own that my opinion *664] is so entirely settled, and I must say so *entirely unchanged by what I have heard of the argument to-day, that, feeling the utmost disposition to do all that can be done to show my respect for my learned Brothers, I do not think that I can consent to say for my part that this writ ought to go. I think it ought not; I feel confident that, if it went, it would be good for nothing. If held valid *primâ facie*, I have no doubt that the return which would be made to it would give it a complete answer. I am satisfied that the only effect of all this would be to keep alive the dreadful agitation and frightful state of religious or rather, let me say, theological animosity which it is impossible not to observe in this country. There would be a delay of at least two years: probably four more days would be consumed in argument: and we cannot tell how much more when it would come into the Court of Error. The bishopric all that time would be vacant: perhaps other vacancies might occur; and no doubt the example here set would be followed: and in every case I should expect in the excited state of men's minds that the archbishop would be called upon to summon all mankind to hear whether they had anything to say against the bishop elect, and to open a court that would probably never be closed.

We have a discretion to issue, or to withhold, the writ of mandamus. Supposing even that I thought it very doubtful how the law was, supposing that I thought that the archbishop was bound to hold a court for confirmation, still I apprehend that I should have a discretion to exercise. The Bishop of Manchester has been consecrated, in spite of some attempt at opposition: and I believe it would be held that the Bishop *665] of Manchester's consecration cannot be questioned. This *opposition is put forward before consecration: but, if consecration had taken place, or even now should follow, then I apprehend that it cannot be questioned, except on the supposition that the proceeding is altogether null and void: of this I see no trace of any evidence whatever in any records in this country; only some few words scattered in ancient

volumes, recording the events of a state of society the most uncertain and obscure.

Now, under all these considerations, feeling the utmost respect for my learned Brethren, and the greatest regret that we do not take the same view, I must own that I feel that some deference is due also to the high person who is named as the defendant in this rule. Some deference is due to those who certify the fitness of Bishop Hampden for the office to which he is elected. Still more deference is due to the peace of the Church, and to the tranquillity of the State. It seems to me that we should be putting everything to hazard, and leading to consequences which it is impossible to foresee, if we, who are firmly convinced that there is no such law as that upon which these parties seek to act, encouraged the smallest doubt as to its existence. Reserving my opinion on that point till I had heard all the observations of my learned Brothers, and keeping my mind open to the last, and free to say that this is a question which ought to be discussed, I must fairly say, with all respect for my Brother COLERIDGE's admirable argument, that it has confirmed me in the opinion of the danger of exposing the Act of parliament, and the most simple construction of the plainest language, and the most inveterate and universal opinion on its effect, to the speculations of those who will bring *their forgotten books down, and wipe off [*666 the cobwebs from decretals and canons, before they can find one argument for disturbing the settled practice of three hundred years.

In my opinion this rule ought to be discharged.

No order was made.

PYE v. MUMFORD.

Under stat. 2 & 3 W. 4, c. 71, if to a declaration in trespass the defendant plead enjoyment as of right for thirty years next before the commencement of the action, and the plaintiff simply traverse such enjoyment, he cannot support the traverse by proof that, though there was such enjoyment, yet, for a period of time, without including which there would not be a thirty year's enjoyment, there was a tenant for life of the locus in quo.

TRESPASS for breaking plaintiff's close, and laying dung, &c., there, and keeping and continuing, &c., and subverting the earth, &c.

Plea 5. That defendant, before and at the time, when, &c., was and still is seised, in his demesne as of fee, of and in certain messuages, farm and divers, to wit, &c., acres of land, contiguous to the close in which, &c.; and that defendant, and all those whose estate he now hath, for thirty years next before the commencement of this suit have continually had and enjoyed as of right and without interruption, and been used and accustomed to have and enjoy as of right and without interruption, and the defendant still of right ought to have, for himself and themselves, his and their tenants and farmers, occupiers of the said farm

and lands, with the appurtenances, for the necessary and efficient cultivation and manuring the same, as to the said messuages, farm, &c., belonging and appertaining, the right and privilege in every year, and at all times of the year, of entering into and upon the close in which, &c., to cart and carry all the muck, dung, &c., made, arising, &c., in and *667] upon the said messuages, farm, &c., into *and upon a certain small and reasonable portion of the said close in which, &c., for the purpose of intermixing thereon such muck, dung, &c., and of making manure thereof; and of continuing such muck, &c., thereon until the same was mixed, &c., and formed into manure, and fit to be carried, and of then carrying the same from and off the said close in which, &c., to be put, placed, &c., upon and over the said farm and lands, &c., of defendant: justification, in exercise of the right. Verification.

Replication. That defendant, and all those whose estate, &c., for thirty years next before, &c., have not continually had and enjoyed as of right and without interruption, nor been used as of right and without interruption, nor ought defendant still of right, &c., to have for himself and themselves, &c. (following the plea.) Conclusion to the country.

Issue thereon. Other issues of fact were also joined.

On the trial, before COLERIDGE, J., at the Suffolk Spring assizes, 1847, it appeared that the defendant had in fact enjoyed the alleged right for the thirty continuous years next before the commencement of the action. But the plaintiff offered evidence to show that, during a part of the time, two parties now deceased had successively held the locus in quo as tenants for life; and that, without including such part of the time of enjoyment, there had not been an enjoyment for thirty years. The learned Judge, after objection, admitted this evidence. A verdict was found for the plaintiff on all the issues, leave being reserved to move to enter a verdict for the defendant on the issue upon the fifth plea.

*In Easter term, 1847, *Andrews* obtained a rule Nisi accordingly. In last term, (a)

Byles, Serjt., and *O'Malley* showed cause. The fifth plea sets up an enjoyment as of right for thirty years, (b) under sects 1 and 5 of stat. 2 & 3 W. 4: the plaintiff meets this by proof that during a part of the thirty years there was a tenant for life, so as to bring the case within sect. 7, this not being a case where the right is "declared to be absolute and indefeasible," as there is no allegation of an enjoyment for sixty or for forty years. The defendant insists that this answer should have been replied, under the concluding words of sect. 5: "and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause

(a) January 21st. Before Lord DENHAM, C. J., PATTESON, COLERIDGE, and WIGHTMAN, Js.

(b) PATTESON, J., during the argument, expressed a doubt whether the plea showed an enjoyment of a profit à prendre: but nothing ultimately turned on this.

or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." Now the exception here relied upon by the plaintiff is provided for by sect. 7, and therefore cannot come within the words of sect. 5, "hereinbefore mentioned." [Lord DENMAN, C. J. The legislature probably meant only "herein:" has the Parliament Roll been looked at?] No: the authorized *printed copy must be relied upon. (a) And the word "hereinbefore" will apply to any mode of defeating the claim, under sect. 1, which would not disprove the enjoyment in fact for thirty years; but a license or interruption during the thirty years is properly set up under a traverse of the enjoyment; *Clayton v. Corby*, 2 Q. B. 813, *Tickle v. Brown*, 4 A. & E. 369. If a tenancy for life, during the thirty years' period, be replied, and traversed by the rejoinder, the defendant may insist that the thirty years' enjoyment alleged in the plea is made up of time preceding and following the tenancy for life; that is the decision in *Clayton v. Corby*; and it follows that the time during which the life estate lasts can make no part of the thirty years. But the defendant here will rely on some expressions in the judgment in that case. The Court there said: "If the plaintiff chooses to reply and set up a tenancy for life, he excludes the time of that tenancy, and drives the defendant to show thirty years' enjoyment either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended;" and, further: "the thirty years alleged in the plea will be the thirty years actually or constructively next before the commencement of the suit, according as the plaintiff shapes his replication." From this it is sought to be inferred that the only way of defeating a plea of thirty years' enjoyment by means of a tenancy for life is to plead it; and that, if it be not pleaded, the enjoyment is unanswered. But these remarks were extrajudicial. * [WIGHTMAN, J. To what preceding part of the statute do you apply the words "incapacity" and "disability," in sect 5?] [669] If there be nothing answering to those words, still the words "hereinbefore mentioned" are unequivocal. [WIGHTMAN, J. The inference from the occurrence of the words "incapacity" and "disability" might perhaps be that the words "hereinbefore mentioned" were to be confined to "other matter." In *Clayton v. Corby* the replication to the second plea confessed and avoided a colourable enjoyment de facto.] [670] If that were done here, the defendant could not, in his rejoinder, rely upon a thirty years made up of portions preceding and following the tenancy for life, without a departure from the allegation of the thirty years' enjoyment in the sense in which it had been pleaded and confessed. The only consistent view is that the plea alleges, what *Clayton v. Corby* shows

(a) At a latter part of the argument, *Dyles*, Serjt., informed the Court that, on inspection of the Parliament Roll, it appeared that the printed copy was correct.

to be a good defence, an enjoyment for thirty years exclusive of any tenancy for life. A replication of a tenancy for life would either be an argumentative traverse of the plea so understood, or would offer no answer to it. If "hereinbefore mentioned" were excluded from sect. 5, the statute would be construed as enacting a bad replication: but in *Tickle v. Brown*, 4 A. & E. 369, 382, this Court clearly held that the statute was to be interpreted according to the ordinary rules of special pleading. If a statute required a four days' notice, exclusive of Sundays, it might be shown, on a traverse of an allegation of the four days' notice, that there were not four days without reckoning a Sunday. In the same way, an allegation of a twenty years' enjoyment of an easement, under *671] *sect. 2, means enjoyment in the character of an easement; and, under a traverse of such allegation, an unity of possession during the twenty years may be shown; *Onley v. Gardiner*, 4 M. & W. 496; or leave and license; *Beasley v. Clark*, 2 New Ca. 705. [PATTERSON, J. The replication was special in *Wright v. Williams*, 1 M. & W. 77, S. C. Tyrwh. & Gr. 375; yet it was not objected to as argumentative. WIGHTMAN, J. Can you, under a traverse, give in evidence a tenancy for years, which is not mentioned in the statute?] That might be done. The intention of the statute was to create a right in cases where there was formerly only a presumption; and this will be effected by the construction for which the plaintiff contends; but, if the defendant's view be correct, the party relying on a life estate is placed in a worse position than before the statute. *Bright v. Walker*, 1 C. M. & B. 211, S. C. 4 Tyrwh. 502, shows that the enjoyment, to give a right, must be valid by way of prescription as against the owner of the fee: here such enjoyment is disproved.

Andrews and *Worlledge*, contra. It is difficult to point out any case to which the enactment at the end of sect. 5, requiring a special replication, can apply, if it does not apply here. *Bright v. Walker* is not to the point: there the prescriptive right was alleged in the declaration, and sect. 5 relates only to the mode of setting up an answer to a plea. [PATTERSON, J. You say that the replication should assume the plea to be *prima facie* an assertion of an enjoyment for thirty years continuously *672] reckoned, and should meet that, *and that then the rejoinder will be in the nature of a new assignment.] That is the principle. [WIGHTMAN, J. This difficulty arises in my mind. Suppose proof is given of an enjoyment *de facto* for thirty years, but it appears that, for part of that time, there was a tenancy for years. A tenancy for years is not mentioned in the act; and yet it has been held that, in such a case, the thirty years gives no title. Now that looks as if the thirty years must be a thirty years valid as against the owner of the fee. If that is the meaning of the plea, a traverse of the plea appears to let in any proof showing that such an enjoyment has not been had. You must, I think, contend that the tenancy for years could not be proved under a

traverse, but must be replied.] It must. [WIGHTMAN, J. The same rule would apply to a license covering the whole thirty years. PATTESON, J. I have sometimes thought that the statute intended merely that all matters affecting the whole period should be replied, but not others. There is a difficulty in allowing a new assignment of a plea. WIGHTMAN, J. Such a special replication as you propose might be true, and yet constitute no answer to the plea.] The plea is in fact created by the statute; on common law principles it would be bad. Then the statute also requires a special replication. In *Bengough v. Edridge*, 1 Sim. 178, "hereinafter" was interpreted to mean simply "herein," or "hereinbefore." "Hereinbefore," in the present act, sect. 5, may be confined to the words immediately preceding, by a construction similar to that which prevailed in *Regina v. Fordnam*, 11 A. & E. 73. *Clayton v. Corby*, 2 Q. B. 813, is a decision in favour of the view *for which the defendant contends. [PATTESON, J. If the plaintiff may understand the thirty years to mean thirty years [*673 exclusive of any life estate, he may traverse; and yet the rejoinder to a special replication would assume that the plea had that meaning. WIGHTMAN, J. To make a special replication complete, ought it not to aver that there was not thirty years' enjoyment besides the period of the life estate? But is not such an averment a traverse? COLERIDGE, J. A replication that all the enjoyment was during a life estate is an answer to the plea: but I do not see how a replication that there was a life estate during part of the thirty years is even a *prima facie* answer.] *Prima facie*, the plea alleges enjoyment for the continuous thirty years next before action brought: the replication of the life estate to that would be good on general demurrer. It cannot be denied that the pleading which the statute directs is anomalous. The words of sect. 5 are "not inconsistent with the simple fact of enjoyment;" the phrase is intentionally varied; in the earlier part of the section the words are "enjoyment thereof as of right." [COLERIDGE, J. *Beasley v. Clarke*, 2 New Ca. 705, is a strong case. There, on a traverse of an allegation, in the plea, of an enjoyment as of right for forty years, the plaintiff succeeded by proving an oral license, though sect. 2 enacts that in case of the enjoyment for forty years the right shall be absolute and indefeasible unless it appears to have been enjoyed by consent given by deed or writing.] The fact of asking leave and accepting an oral license negatived the enjoyment "as aforesaid," that is, "by any person claiming right," according to the language of sect. 2. [WIGHTMAN, J. *But it would be "not inconsistent with the simple fact of enjoyment," according to the language of sect. 5: it only accounts for [*674 the fact.] It is not an answer given, like that of a life estate, by sect. 7, but is a direct negative in fact of the matter alleged in the plea. [PATTESON, J. Sect. 5 appears to relate to matter which can be "set forth in answer:" and the plaintiff says that the life estate cannot be so set forth, but is merely an element in the computation of the time.] It

was not intended to confine sect. 5 to cases which strictly offer an answer to the action. If the defendant rejoined matter consistent with the life estate, but showing a thirty years' enjoyment exclusive of the time of that estate, the plaintiff might traverse such matter: but the present traverse is premature. The matter offered here under the traverse is relied upon under a distinct enactment in defeasance of a previous enactment, and ought therefore to be shown on the record by the party relying on it; *Thibault v. Gibson*, 12 M. & W. 88, where PARKE, B., cites note (1) to *Sanders's Case*, 1 Wms. Saund. 262 *a*. [Lord DENMAN, C. J. That is familiar law.] That a life estate is properly within the word "incapacity" in sect. 5 appears from sect 7, where the tenant for life is spoken of as a person "otherwise capable of resisting any claim."

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

This was an action of trespass *quare clausum fregit*. The defendant *675] pleaded the enjoyment of a right on the *land for thirty years, under the first section of stat. 2 & 3 W. 4, c. 71. The plaintiff by his replication traversed the enjoyment. At the trial, the defendant proved the enjoyment for thirty years next before the action; in answer to which the plaintiff proved that during part of those thirty years the land had been held by a tenant for life. The question in the cause is, whether the plaintiff was at liberty to do so, or whether he ought to have replied that fact specially.

By sect. 7 it is plain that the time during which the tenancy for life subsisted is to be left out in computing the thirty years: and the defendant, if the point be properly raised by the pleadings, must show an enjoyment for thirty years exclusive of that time, either subsequent to that time, or partly prior and partly subsequent. This was established in *Clayton v. Corby*, 2 Q. B. 813. Whether the point was properly raised, depends on the 5th section, which enacts (His Lordship here read the clause). Now the tenancy for life is clearly a matter of fact not inconsistent with the simple fact of enjoyment: and therefore, if it be an answer to the defendant's plea, it is plain that by the express words of the 5th section it ought to be replied, and cannot be received in evidence on the traverse taken. Whether it be an answer to the plea, depends upon the sense in which that plea is to be read. If the plea asserts thirty years' enjoyment computed as the 7th section directs, that is exclusive of tenancies for life, &c., then the statement of a tenancy for life would obviously be no answer to the plea; for the plea has already excluded the time of such tenancy. The plaintiff in such case *676] could not rely on the tenancy for life, and therefore need not and could not reply it. If, on the other hand, the plea is to be read as *prima facie* asserting an enjoyment for the actual thirty years next before the action, counted in the ordinary manner, then the tenancy for life during a part of that time would be *prima facie* an answer to the

plea, and would be relied on by the plaintiff, and ought to be replied. The defendant would then be driven to rejoin, either denying the tenancy for life, or in some form asserting an enjoyment for thirty years exclusive of the time of that tenancy.

It is said that such a rejoinder as last-mentioned would be a departure from the plea, because, to make it consistent with the plea, the sense first supposed must be given to the plea, and then the replication would be unnecessary; whereas the sense secondly supposed is the only one which calls for a replication. The Court, in *Clayton v. Corby*, 2 Q. B. 825, said "The thirty years alleged in the plea will be the thirty years actually or constructively next before the commencement of the suit, according as the plaintiff shapes his replication." We think this the true construction of the plea.

The defendant cannot be supposed to know the plaintiff's title, or to be cognisant of any tenancy for life: he may well intend to set up thirty years' enjoyment actually next before the action; but, when he is informed by the plaintiff's replication that a tenancy for life existed, he may well prepare to establish an enjoyment for thirty years constructively. The words of the plea are large enough for either case; and the second sense put on them by the rejoinder is in the nature of a new assignment. It is true that a new assignment proceeds [*677 on the supposition that the other party has mistaken the meaning of the previous pleading; and doubtless any new assignment which enlarges and goes beyond the previous pleading of the same party is bad. The rejoinder therefore, in such a case as the present, cannot be taken as being strictly a new assignment: it would be a departure, and contrary to the rules of pleading, but would be necessary, and therefore good by force of the statute, if we are right in saying that the statute requires that a tenancy for life should be specially replied. No other view of the pleadings would put the parties on equal terms, nor meet the plain intention of the legislature, collected from the words of the 5th and 7th sections of the act.

Some argument was raised in respect of the word "hereinbefore," used in the fifth section: but it is not necessary to consider this; for that word is not applicable to the subsequent words, "matter of fact" "not inconsistent with the simple fact of enjoyment," on which our judgment turns.

We are therefore of opinion that the evidence was improperly received, and that the rule ought to be absolute to enter a verdict for the defendant on the fifth plea. But, under the circumstances, we think that the plaintiff ought to be at liberty to amend on payment of costs, and a new trial be granted.

Rule accordingly.(a)

(a) See *Ward v. Robins*, 15 M. & W. 237.

678] *The QUEEN v. The Inhabitants of DUKINFIELD.Feb. 26.*

To prove before removing justices the execution of a former order of removal directed to parish D., it was stated in the examinations that an overseer, after obtaining such former order employed T. G., since deceased, to execute it: and that, *after T. G. returned from removing the paupers*, he signed the following endorsement on the order: "Delivered to W., overseer of D., June 23, 1826, by T. G." Held that, on the whole statement, there was some evidence on which the justices might presume an execution of the order.

On trial of an appeal against the order founded on these examinations, it appeared in evidence that the endorsement was signed by T. G., a person employed as above, the signature only being in his handwriting: and that, on the morning of the alleged removal, the paupers were seen going with T. G. from the removing parish for the purpose of proceeding to D. On a question reserved for this Court, whether the endorsement was receivable in evidence, and whether, without it, there was evidence from which the sessions might infer execution of an order of removal: Held that, if it was assumed on both sides at sessions that such endorsement usually followed the delivery of paupers under an order, the endorsement was properly received in evidence, as a thing done in the usual course of duty. But that, without the endorsement, there was evidence from which execution of the order might be inferred.

The appellants, at sessions, relied upon the quashing of a former order of removal, relating to the same paupers, on the trial of an appeal between the same parishes. The entry made by the Court as to that order was, that it was quashed by consent of parties, for the "*informality and insufficiency of the examinations.*" The sessions having, on the subsequent appeal, decided, subject to the opinion of this Court, that the order was quashed on grounds which did not make the quashing conclusive: Held that the Sessions had a right to decide this on consideration of the circumstances before them, and that this Court ought not to interfere with their finding.

On appeal against an order of justices, dated 14th May, 1845, for removing Charles and Mary Jane Smith, the children of William Smith, deceased, from the township of Stockport in Cheshire to the parish, township, or place of Dukinfield in the same county, the Sessions confirmed the order, subject to the opinion of this Court upon a case, which was stated substantially as follows.

The respondents relied upon a former order for the removal of W. Smith the father from the respondent to the appellant township, dated 22d June, 1826, which was not appealed against. For the purpose of proving the service of the order and the removal of the paupers under
 *679] it, the examinations upon which the order of 14th May, 1845 (now in question), was made, set forth the examination of Joseph Halton, who said that, in 1826, he was assistant overseer of Stockport; that, the day after the order of 1826 was made, he employed one Thomas Green to execute the order; and that, after the said T. Green returned from removing the said paupers as aforesaid, he signed the following endorsement on the order: "Del^d. to Mr. Woolley, overseer of Dukinfield, June 28, 1826, by Tho^d. Green:" that Green was dead, and that the signature, "Tho^d. Green," was of his handwriting. The order was duly set forth in the examination of Halton. The examination of Mary Hadfield, the mother of Charlotte Smith, stated that, in 1826, the said W. Smith was residing in and chargeable to the township of Stockport, and the overseers of Stockport, in right of his settlement in Dukinfield, obtained a magistrate's removal order.

The appellants objected by their grounds of appeal that the examinations contained no legal evidence of the removal of W. Smith, his wife and two children, to Dukinfield, and the delivery of them to the overseers of the poor thereof, or to one of such overseers, under the order of 1826; and that the examinations did not set forth by legal evidence any cause of removal of the said Charles and Mary Jane Smith, or establish any settlement of them or either of them in Dukinfield. After argument the Court overruled the objection, and allowed the respondents to proceed upon this ground of settlement.

The appellants also contended that the respondents were concluded by a former order of removal of the same paupers, which was appealed against and quashed. *By an order of two justices, dated 29th April, 1844, the same paupers were ordered to be removed from Stockport to Dukinfield. The appeal was entered at the July sessions, 1844; and, at the October sessions, 1844, to which the hearing of it was respite, it was entered for trial and called on; and, after some discussion as to the sufficiency of the examinations, but without entering into the merits of the settlement, the order of removal was quashed, and the following order of Court was made (after the formal part of an order of sessions, and after reciting the order of removal and appeal): "Now it is ordered by this Court, by the consent, as well of the overseers of the poor of the said township of Stockport, as the overseers of the said parish, township, or place of Dukinfield, that the said recited order shall be and is hereby repealed and made void by reason of the informality and insufficiency of the examinations on which the now reciting order was made." The Court of Quarter Sessions thought the quashing of the order of 1844 not conclusive, and allowed the respondent to proceed.

The respondents then proved the order of 1826, and, to prove the service thereof upon the overseers of Dukinfield, and the removal of W. Smith, his wife and two children thereunder, the endorsement above mentioned was offered in evidence; and the counsel for the appellants objected to its reception: but the Court overruled this objection, and admitted the endorsement in evidence. The signature of Green to the endorsement was proved; and it was also proved that he was not an overseer of the poor of the township of Stockport at the date of the order or endorsement, and that he had *been dead six or seven years. It was proved by the respondents that Green had been employed by the overseers of Stockport to remove the said W. Smith, his wife, &c., under the order of 1826. It was also proved that the words "Del^d. to Mr. Woolley, overseer of Dukinfield, June 23, 1826, by" were not in the handwriting of Green, but that the signature merely was his; and the said Mary Hadfield proved that, on the morning of the removal of the said W. Smith, his wife, &c., under the order of 1826, she saw them leaving Stockport with Green for the purpose of going to Dukinfield. They returned the same night with four shillings.

The sessions confirmed the order of 14th May, 1845, subject to the opinion of this Court upon the following points. 1. Whether there was sufficient evidence, upon the face of the examinations on which the order was made, of the removal and conveyance of W. Smith and his wife and their two children from Stockport to Dukinfield, and of their delivery to the overseers of Dukinfield, or to one of them, under the order of removal of 1826, with that order or a copy thereof, to enable the respondents to give evidence of that settlement. 2. Whether the quashing of the order of 1844 was conclusive between the parties as to the settlement of the paupers. And, 3. Lastly, whether the endorsement on the order of 1826 was properly received in evidence on the trial of the appeal.

If the Court should be of opinion, either that the examinations were insufficient in the particular aforesaid, or that the quashing of the order of 1844 was conclusive between the parties as to the settlement of *682] the said paupers, or that the endorsement on the order of 1826 was improperly received in evidence on the trial of the appeal, and that without such endorsement there was not sufficient evidence of the removal of the said W. Smith, his wife, &c., under the order of 1826, then the order of 14th May, 1845, and the order of sessions confirming the same, were to be quashed; otherwise to be confirmed.

The case was argued in last Michaelmas term. (a)

Pashley, in support of the order of sessions. First: It is sufficient if the examinations contained any legal evidence as to the execution of the former order. Now it appears by them that the overseers employed a person whom, by stat. 54 G. 3, c. 170, s. 10, they were authorized to employ, for the purpose of removing the paupers, and that a statement of his having executed the removal was signed by him in the due performance of his duty. His office, as an agent for the purpose stated, required that he should give a minute in the nature of a return, showing what he had done. He would have been liable to indictment if he had not properly delivered the paupers. The case resembles *Doe dem. Patteshall v. Turford*, 3 B. & Ad. 890, and *Poole v. Dica*, 1 New Ca. 649, and differs from *Chambers v. Bernasconi*, 1 Cro. M. & R. 347, S. C. 4 Tyr. 531, where the matter which it was proposed to prove by an officer's minute did not necessarily form a part of his return. So in *683] *Regina v. Worth*, 4 Q. B. 132, where evidence of this kind *was held inadmissible, there was no official duty performed in making the memorandum. The admissibility of entries which it was the party's duty to make is insisted upon by BRUCE, V C., in *Pickering v. The Bishop of Ely*, 2 Y. & Coll. (Chanc.), 249, 258, 259; and he remarks that such writings may "be considered rather as evidence of acts done than of declarations." Secondly, the quashing of the former order was no estoppel. It was quashed by consent, and merely for "the infor-

(a) November 10th. Before Lord DENMAN, C J., COLERIDGE, WIGHTMAN, and ERLE, J.

mality and insufficiency of the examinations." A quashing for "informality" may or may not be on substantial grounds; *Rex v. Cottingham*, 2 A. & E. 250. This Court cannot judge, from the mere use of the word, whether the grounds were substantial or not: nor will they inquire into this, if the Sessions have professed not to determine the merits; *Regina v. Kingsclere*, 3 Q. B. 388. It was held in *Regina v. St. Anne's, Westminster*, 9 Q. B. 878, that, where an order of removal had been quashed, not on the merits, the Sessions, on appeal against a subsequent removal, could not receive evidence that the merits had been involved in the former decision. Lastly, the endorsement was rightly admitted as evidence at sessions, for the reasons before given; and even without that document there was evidence at least sufficient to prevent this Court from reversing the judgment of the Sessions.

Townsend, *contra*. First: There was not sufficient evidence on the examinations. [Lord DENMAN, C. J. If there was any evidence, we need not pronounce *whether or not it was sufficient.] As to the [*684 endorsement. The agent Green had to do two things: to convey and deliver the paupers, and to deliver the order of removal, or leave a copy after showing the original: and, unless these things were correctly done, a subsequent order is not prejudiced; *Rex v. Alnwick*, 5 B. & Ald. 184. Now the endorsement here, even if admissible, does not prove that these things were done. It does not show what was "delivered," nor how the delivery was made. Green does not appear to have been a person regularly employed to deliver paupers: that being so, the Court will not presume anything in favour of the discharge of such duty by him. The minute was not contemporaneous; for the first examination states it to have been made after Green returned from removing the paupers. He was then *functus officio*. In *Doe dem. Patteshall v. Turford*, 3 B. & Ad. 890, the evidence was much more complete. Two out of three notices which had been carried out together under the same circumstances were shown, otherwise than by the endorsements, to have been delivered. An invariable course of practice was proved. And the party who should have been served with the notice in question, to quit premises, had prayed, after the date of the supposed service, that he might not be compelled to quit. The cases on this subject are commented upon in Smith's note on *Price v. The Earl of Torrington*, 1 Salk. 285, 1 Smith's L. Ca. 139. The present minute is insufficient also for want of proof that "Mr. Woolley," mentioned in it, was in fact overseer of Dukinfield. Secondly, the former order was conclusive. *["Insufficiency of the exami- [*685 nations" is more than informality; and an order of sessions grounded on it bars any future removal on the same alleged case of settlement; *Regina v. Ellet*, 7 Q. B. 593. The difference between such a defect and a mere "informality" appears from *Rex v. Cottingham*, 2 A. & E. 250, cited on the other side. At all events, where the expressions "informality" and "insufficiency of the examinations" occur together,

they must be taken to mean different things. [COLERIDGE, J. The case states that the order of 1844 was quashed "without entering into the merits."] That means without evidence on the merits being received at the sessions. To hold that the present order of removal might be made notwithstanding the entry at the July Sessions, 1844, would overrule *Regina v. Evenwood and Barony*, 3 Q. B. 370, and several other cases.

Cur. adv. vult.

ERLE, J., now delivered the judgment of the Court.

In this case the first question is, in effect, whether there was any evidence in the examination to raise a presumption that the order of 1826 had been duly executed: and we are of opinion that there was. The language of the examination imports that Green had removed the paupers; for it states that Green was employed to remove, and, after he *returned from removing* as aforesaid, he signed a paper. Besides this, if an agent is employed to remove a party of paupers, and the removal is shown to be commenced, and the agent returns at such a time and in *686] such a manner as is *consistent with his having performed his employment, and is shown to be dead at the time of the examination, there is not an entire absence of evidence that the order has been executed. When there is any evidence at all, the magistrates alone are to decide on the weight it is entitled to.

The second question is, whether the quashing of the order of 1844 was conclusive: and we are of opinion that the Sessions had the right to decide this, upon considering the circumstances under which the quashing took place: and, if they come to a decision, we do not interfere with it.

As to the third question, we are of opinion that there was evidence from which the Sessions were at liberty to infer the execution of the order, without the endorsement. The evidence upon the trial of the appeal was stronger than that which was stated in the examinations.

With respect to the endorsement, if it had been proved, or if it was assumed without inquiry, by consent of all, that such endorsements were required and made in the usual and regular discharge of the duty of removal, we are of opinion that it was admissible. It would then fall within the principle of *Doe dem. Patteshall v. Turford*, 3 B. & Ad. 890, where the endorsement of the fact and time of serving a notice to quit was held admissible evidence of such service, on proof that it was the usual course of practice in the attorney's office, and that the man who endorsed was dead; and this, although the attorney whose endorsement was there admitted was not in the habit of serving notices *687] *himself; it being presumed that the attorney would do what he required his clerks to do. (See other cases collected, *Phillips on Ev.* (8th ed.), 338 & seq.(a)) If the endorsement usually followed the fact

in question, it is admissible as evidence of that fact, on the general principle that an antecedent may be inferred from a consequent as soon as the usual sequence of facts is proved. In this case no statement is made of the practice of requiring an endorsement: still the precaution is so obviously prudent that it may not have been disputed.

But it is not necessary to decide on the admissibility of the endorsement under the facts stated, as the order is to be confirmed although it should be inadmissible, if there was sufficient evidence without it; and we have stated our opinion that such was the case.

Orders confirmed.

***DOE, on the several demises of GEORGE, Earl of EGREMONT, and of GRANT, v. WILLIAMS and HOLE. [*688**

Tenant for life, under the limitations of a devise, had power to lease, for term of years determinable upon two or three lives, any part of the premises usually so leased, so that there were reserved the ancient and accustomed rents and heriots of the premises therein contained, or more, and so that in every of the leases there were contained the usual and reasonable covenants.

1. Held that two tenements, which had previously been leased separately, might be leased together under a single demise, no objection being made that the rent, &c., reserved were not in proper proportion.

2. The pattern lease, of 1749, contained a covenant to do suit and service at the courts of the manor of W. (in which the premises lay), in such manner as the tenants of the manor were accustomed, and to pay all fines and amerciaments there imposed by reason of any just cause. A lease by the tenant for life, in 1831, contained a covenant to perform suit and service at the courts, but no covenant to pay the fines. In fact, since 1739, no court baron or customary court had been held; and there had been no freehold or copyhold tenant within legal memory.

Held, not a defective execution of the power; since, as there could no longer be a court baron or customary, a covenant to pay fines in such courts was not a reasonable covenant; and the Court would not assume, in order to avoid the lease, that there were other courts (as leet) of the manor; and, if they did so assume, would not hold that a covenant to pay fines there was reasonable.

3. The pattern lease contained a grant of waters and watercourses, excepting to the lessor "a watercourse flowing or descending from a head weir," erected on the premises, "in and through a meadow," "parcel of the premises," "and from thence conveyed by a trough into a meadow," "for watering and improving the same and other lands of" the lessor. At that time, the weir forced the water of a natural stream to flow along an artificial trough, so as to irrigate lands of the lessor below. After 1749, M., a lessee, erected a mill above the weir, and used some of the water, which returned to the natural stream below the weir, and could not be used for irrigating the said lands below. Afterwards a tenant for life leased the premises, "together with so much of the water" as M. had "been accustomed to have," for working his mill, "also the use of the water descending from the head weir," "except and reserving to the occupiers of the meadows watered by the said course running from the head weir," and thence by the trough, the right "to take the water for watering the meadows having the right thereto as heretofore accustomed."

Held: first, that the pattern lease did not except the channel over which the water flowed, but only subjected it to the easement; and therefore the last lease did not grant more land than the pattern lease: Secondly, that it was a question for the jury, whether the use of the water given by the last lease to the lessee was or was not larger than the use which the former lessee had under the pattern lease: and, they having found in the negative, that the lease was not a bad execution of the power.

EJECTMENT for two tenements, called Catwell and Raglands, in Somersetshire.

*689] On the trial, before PLATT, B., at the Somersetshire *Summer assizes, 1845, it appeared that the premises were in the manor of Williton Regis, and that Lord Egremont, the first-named lessor of the plaintiff, claimed (a) under devise of Charles, Earl of Egremont, dated 31st July, 1761, through William Frederick Wyndham, fourth son of the devisor. (b) This title was proved: but the defendants relied on a lease, granted by a former tenant for life under the devise (George O'Brien, Earl of Egremont), and which, it was contended, was warranted by a power contained in the devise.

The power given in the devise of 1761 was (c) "to and for the several and respective persons to whom any estate for life is hereinbefore devised," when respectively in actual possession of the manors, lands, &c., respectively, to demise by indenture all or any of the manors, lands, &c., for any term or number of years not exceeding twenty-one, to take effect in possession: "so as in every such lease or demise there be reserved to continue, payable half-yearly or oftener during the term thereby to be granted, and to be incident and go along with the reversion or remainder," &c., "the best and most improved yearly rent and rents that can, at the time of making such leases, reasonably be got for the same, without taking" "fine, premium, or foregift; and also to demise, lease, and grant, in possession or reversion, for one life or for two or three *690] lives, or for any term or number of years *determinable upon one life or two or three lives, any part of the said premises usually so leased, so that all the leases" which shall be in force at the same time shall be determinable on the dropping of one life, or of two or three at the most; "and so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained or more; and so that, in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained;" and so as there be no clause giving power to any lessee to commit waste, or exempting him from punishment for committing the same; and so as the respective lessees execute counterparts of such leases.

The tenements Catwell and Raglands were both comprehended in this devise, and had been, before and at the time of the devise, let by separate leases. It was admitted that a lease of Catwell, made 22d April, 1749,

(a) Grant claimed under an outstanding term, upon which ultimately nothing turned.

(b) The limitations of the devise, and the dates of some of the events under which the several interests accrued, will be found in the report of Doe dem. The Earl of Egremont v. Forwood, 3 Q. B. 627.

(c) The same power is a little more fully set out in Doe dem. Lord Egremont v. Stephens, 6 Q. B. 208, 214.

was to be taken as a pattern lease. This was a lease by Sir Charles Wyndham, for ninety-nine years, determinable on two lives, of a messuage, &c., "together with all houses, outhouses, edifices, buildings, ways, passages, waters, watercourses, easements, profits, commodities, advantages, and appurtenances whatsoever, to the said messuage, tenement, and premises of right belonging and appertaining, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, *ex-cept, out of this present demise and grant, unto the said Sir Charles Wyndham, his heirs and assigns, a watercourse flowing or descending from a head weir formerly erected on the croft, parcel of the premises, in and through a meadow, parcel of the said demised premises, called Little Moor Mead, and from thence conveyed by a trough into a meadow formerly in the possession of Barnard Woolcott, deceased, and now of Humphery Tanner, clerk, for watering and improving the same and other lands of the said Sir C. Wyndham." And the lessee therein covenanted that he would "do suit and service unto all and every the court and courts of the said Sir C. Wyndham, his heirs or assigns, to be holden and kept for or within the manor of Williton Regis aforesaid, upon such notice as is usually given for holding such courts; and shall be there sworn and ordered by the steward, and with the homage, for the time being, of the said manor, in all things relative to the said demised premises, in such manner as other the tenants of the same manor in respect of their several estates are used and accustomed to do; and shall and will pay, bear, and discharge all fines, amerciaments, penalties, and sums of money which shall be there set, laid," &c., "upon or against the said lessee, his executors," &c., "for or by reason of any neglect, offence, or just cause."

The lease under which the defendants claimed was dated 24th December, 1831. By it, George O'Brien, Earl of Egremont, demised the two tenements, Catwell and Raglands,^(a) together, to the defendants, for *ninety-nine years, determinable on three lives. In the description of the parcels were the words "together with so much of the water from the shuts in Dawes Ground as the late Mr. Richard Morle has been accustomed to have, and at the same time, for the purpose of working the said leather mill; and also the use of the water descending from the head weir, formerly erected on the croft parcel of the said tenement called Catwell, except and reserving to the occupiers of the meadows watered by the said course running from the head weir aforesaid, through the Little Moor Meadow, parcel of the said tenement called Catwell, and thence by an aqueduct or trough into Townsend Meadow, now in the occupation of Susannah Date, widow, the right to enter and cleanse the said watercourse, and to take the water for watering the meadows having the right thereto as heretofore accustomed." The covenant respecting

(a) It was not suggested that the rent, &c., reserved in this demise were not proportional to those respectively reserved on the former several demises of the two tenements.

the courts was to "perform suit and service at all the courts to be held by the said lessor, his heirs and assigns, in or for the manor of Williton Regis."

The objections to the execution of the power had been delivered under a judge's order.^(a) They stated that the terms and provisions of the power contained in the devise of 1761 were not pursued in making the lease of 1831: "And the particular objections thereto are:

"That the ancient and accustomed rents and heriots are not reserved for the premises therein contained.

"That the lease includes hereditaments and premises not usually so leased, viz. the water from the shuts in Dawes Ground, and the use of the water descending from the head weir erected on the croft parcel of Catwell.

*693] "That the lease omits the following usual and reasonable covenants: viz. a covenant to do suit at the courts of the manor of Williton Regis, and be there ordered and justified, according to the manner in which such covenant is inserted in the pattern leases of the same premises; also a covenant to pay the fines to be imposed at the said courts.

"That the said lease does not contain any covenants to the above or the like effect.

"That the said lease demises premises before separately demised at separate rents, reserving one entire rent for the whole: and that such premises are improperly joined in one and the same lease.

"That the premises contained in the said lease were not usually so leased as in the said lease."

It appeared, at the trial, that no court baron or customary court had been held within the manor since 1739: there was no proof that there had been any freehold or copyhold tenant of the manor within living memory; and it was ultimately admitted that there had not.

It further appeared that the watercourse, mentioned in the pattern lease, had been formed by a head weir, which dammed up the waters of a natural stream, so that they flowed by an artificial trough, and were used for irrigating lands, belonging to the lessor, lying lower down: that afterwards, and before the making of the lease of 1831, one Richard Morle, being then lessee of the premises, had erected a mill higher up the stream: and that part of the water of the stream ran into the mill leat, and was returned from thence into the stream below the head weir, so that it could not be used for irrigating the lower meadows. Evidence

*694] was given as to the quantity of water which had passed along the trough before and after the erection of the mill. The learned Baron desired the jury to say whether the lease assumed to grant a larger use of the water than had been enjoyed before; and, upon the foreman inquiring whether the tenants of the meadows had a right to all the water if they required it, he told them that they had. Upon which the jury

(a) See Doe dem. Lord Egremont v. Williams, 7 Q. B. 684.

found for the defendants. Leave was reserved to move to enter a verdict for the plaintiff: and in Michaelmas term, 1845, *Crowder* obtained a rule nisi to enter such verdict, or for a new trial. In Hilary term and vacation 1847,(a)

Cockburn, Butt, and Kinglake, Serjt., showed cause. First, the union of the two tenements, Catwell and Raglands, in a single lease, is no excess of the power. In Doe dem. Earl of Shrewsbury v. Wilson, 5 B. & Ald. 363, it was decided that premises, formerly let together, might, under a power substantially resembling the power here, be let by separate demises. That was the converse of the present case: but there is still less reason here for holding that the power has been exceeded; because in Doe dem. Earl of Shrewsbury v. Wilson the reversioner, under the lease in question, could distrain only upon the portion for which rent was in arrear, instead of the whole premises being, as before, liable for the whole rent; but here the power of distress is enlarged, and the reversioner may distrain on any part of the united tenement for any arrear of *the whole rent. Accordingly in Doe dem. Lord Egremont v. [*695 Stephens, 6 Q. B. 208, 226, 7, it was held that, under the very power now in question, tenements formerly let separately might be united in a single lease reserving a proportional rent.

Secondly, as to the objection that the lease contains no covenant to pay fines. There is a covenant to do suit and service at all the courts. And the payment of the fines would follow as an incident to the doing suit and service. [Lord DENMAN, C. J. But has not the reversioner a right to say, I wish to be able to maintain the particular action, covenant, for non-payment of fines?] If that be so, another answer is that there are no courts at which suit and service can now be done; and there is no freehold tenant. A covenant to pay the fines would therefore not be a "usual and reasonable" covenant. No amercement of a freeholder can be enforced which has not been affeered by freeholders of the manor; Baldwin v. Tudge, 2 Wils. 20. In Chetwode v. Crew, Willes, 614, 618, note (a), it was held that a court baron cannot be held without at least two freehold tenants of the manor, and that no such tenure can now be created. To the same effect are Bradshaw v. Lawson, 4 T. R. 443, and Com. Dig. *Copyhold* (R. 1); and there (R. 2), it is also said that there cannot be a customary court without copyholders.(a) The same doctrine, as to both courts, is laid down in 2 Bac. Abr. 588, 4 (7th ed.), title *Courts, The Court Baron*. Indeed the original covenant here was unmeaning, since a lessee for years, being neither freeholder nor copyholder, cannot do suit *and service at either a court baron or a customary court, [*696 and therefore cannot be liable to fines.

Thirdly, as to the grant of the water. The grant in the lease to the

(a) January 12th and February 2d. Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, Jc.

(b) Citing Co. Lit. 58 a.

defendants is restricted, and narrower than that in the pattern lease. The pattern lease reserved to the lessor only so much of the watercourse, that is of the flowing water, as was employed for watering and improving the land of the lessor. The rest would pass to the lessee. But the lease in question gives the lessee only so much as Morle had been accustomed to have for working his mill, and the water descending from the head weir, excepting out of this the accustomed right to take the water by the occupiers of the irrigated land. On the facts, this would probably be a less, and could not be a greater, quantity than that left unexcepted by the pattern lease. If there be a doubt as to the fact, it was for the decision of the jury, to whom it was left by the Judge, and who found for the defendants.

It will, however, be argued that the reservation "to the occupiers of the meadows watered" is invalid, they being strangers to the lease. But these occupiers are the tenants of the lands for the irrigation of which the reservation in the pattern lease was made. Therefore the exception follows the pattern lease, and limits the grant to the lessee in the same way as before. But that which is objected to as a bad exception is, in truth, no exception, but a mere declaration by the lessor that an old easement is not to be interfered with.

Crowder, Montague Smith and Phinn, contra. The first objection to the lease is given up. The second objection is good: the covenant was *697] a usual covenant; *and an attendance at leets, popularly called manor courts (though not technically courts baron or customary), might be useful for the purpose of proving the identity of the premises, and keeping up the manor as a reputed manor. Thirdly: the granting part of the lease is not restricted by the exception, for the exception is bad; an exception to strangers is inoperative. Besides, the pattern lease excepted the watercourse, that is, the soil: here the water only is excepted.

Cur. adv. vult.

COLERIDGE, J., in this vacation (February 26th), delivered the judgment of the Court.

This case was tried before my brother PLATT, when a verdict passed for the defendants on a point submitted to the jury, with leave to enter it for the plaintiff if we should be of opinion that the question in the cause was one of law, which ought to have been ruled in his favour.

The case for the plaintiff rested on objections to the lease under which the defendants held, as not supported by the power under which it was made: and these objections were ultimately reduced to two, now to be considered.

The first was stated thus. In what was taken as the pattern lease, executed in 1749, was a covenant to do suit and service at the court of the manor of Williton on usual notice, to be there sworn and ordered by the steward, and to pay all fines and amerciaments there lawfully imposed. In the lease in question was a covenant to do suit and service;

but there was no express covenant to pay fines and amerciaments for default of suit. The power required that in all leases granted [*698
 *under it should be contained all usual and reasonable covenants.

It was admitted that no courts baron or customary courts had been held within the manor from 1789; and it was admitted in the argument that there had been no freeholders or copyholders within the manor within the time of living memory: and there was no evidence to the contrary offered at the trial. It was therefore urged, on the part of the defendants, that, this being a lease for years, the covenant was not properly a usual or reasonable covenant; that the court baron could not be now held, because there were no freeholders; nor could it be revived, because no freehold tenure of the manor could by law be created at this day: and, by the same course of argument, it was urged that no customary court could be held, or revived, for want of copyholders. And it was said that, although this covenant was found in the pattern lease of 1749, it was not conclusively to be taken to be a usual and reasonable covenant.

We agree in these arguments; nor in truth were they much disputed at the bar.

But it was urged that, although the court baron and customary court were irrevocably gone, and so there were no courts, properly speaking, of the manor, that were or could be held, yet there might be courts, such as the court leet, that in a popular way might be called manor courts, which, in order to the identification of property, as belonging to this reputed manor, it might be reasonable to bind the tenants occupying lands in it to attend; and that, so considered, the covenant would still be a reasonable one.

But it would be unreasonable to give the words in the covenant a meaning other than they would *naturally bear, in order to avoid [*699
 the lease: and, even if we gave the words the sense desired, and allowed the inference that a covenant to attend them might be reasonable for the purpose stated, it by no means follows that it would be unreasonable to omit that which alone is omitted, the covenant to pay fines and amerciaments for default of suit. On the contrary, such a covenant might raise such questions as to the jurisdiction to impose the fine or amerciaments, and to whom it was to be paid, that it might be considered very reasonable to omit it, leaving the lord to his remedy by action for the breach of the simple covenant to do the suit. On this ground, therefore, we see no reason to disturb the verdict.

The second point, which was much more contested at the bar, was stated thus. In the pattern lease, out of the general grant of water, watercourses, &c., was excepted a watercourse flowing by means of a head weir out of a natural stream into an artificial channel, made through the demised lands on a higher level for the purpose of irrigating them and other lands of the lessor lower down the stream. In the interval between 1749 and the grant of the lease in question in 1831, one Morlé,

then tenant of the premises, had erected a mill and diverted water from this watercourse, and so diminished the water for irrigation of the lands just mentioned, the water he so abstracted being returned, not to the artificial channel, but to the natural stream, and so made unavailing for the purposes of those lands. In the lease of 1831, the grant to the lessee is only of so much of the water as Morle had been accustomed to have for the use of his mill; and there was no exception of the water *700] course to the lessor, but only, to the *occupiers of the meadows below, a right to enter and cleanse the watercourse and take the water for the use of their meadows, as heretofore accustomed. And this exception, the counsel for the plaintiff urged, did not profess to include the watercourse, and was in itself merely void; so that the watercourse, which before was not demised, now passed to the lessee by the general words of the lease; and the remainder-men were also injured in respect of their lower lands, the abstraction of water by Morle being now made legal, if the lease in question was sustainable.

This objection therefore is twofold: first, that more is now demised, i. e. the watercourse itself, than was granted by the pattern lease; secondly the injurious consequence, the permanent diminution of water applicable to the irrigation of the lands below.

As to the first, it appears to us that the objection rests upon an assumption of fact as to the pattern lease, not well founded. It is assumed that the artificial channel through which the water flowed from the head weir did not pass by it, and was excepted out of the demise. But we collect the words of the exception in that lease to have been (following after a grant of all waters and watercourses belonging, &c.), "except a certain watercourse *flowing* through Little Moor Mead, and thence into another mead named, for watering it and other lands of Sir C. Wyndham." Now, without saying that a watercourse may never mean the channel in which water flows, it certainly may mean also the stream or flow of the water itself: and, whether it means the one or the other in any instrument, will very materially depend on the context. And, in *701] the case before us, it appears to us that that which flows *through lands named, for the purpose of watering them and other specified lands, must be taken to be the water itself, and not the channel through which it flows. If so, the channel itself would have passed by the pattern lease, subject only to the easement of the flow of water in it, which was substantially the thing excepted. And so the first part of this objection fails.

It may be doubted whether, if this be removed, what remains is open for the plaintiff to insist upon, with reference to the notice of objections.^(a) But, if it be, it clearly raised not a point of law for the Judge, but of fact for the jury. It was necessary to ascertain what quantity of water Morle had been accustomed to have to turn his mill, before it could be

(a) See *antè*, p. 692, and note (a), *ibid*.

determined whether a grant of that quantity was in excess of what was granted by the former lease. The jury have, in effect, been directed to consider that question : and their finding is not questioned.

We are, therefore, on the whole, of opinion that this rule should be discharged.

Rule discharged.(a)

(a) The argument in support of the rule is reported by H. Davison, Esq.

*DOE, on the several demises of GEORGE, Earl of EGREMONT, and Another, v. COURTENAY. Feb. 26. [*702]

Tenant in fee demised the land by indenture for a term depending on certain lives, and then devised his estate to his son for life, with remainders over, and with a power to tenant for life to grant leases. After testator's death, and during the above term, the son granted the lessee a fresh lease of the land, and the new indenture of lease set forth that it was granted in consideration of the surrendering up into the hands of the lessor by the lessee, at or before the delivery thereof, of the lease first granted, *which surrender is hereby made and accepted accordingly*. The new lease was a bad execution of the power. One of the lives mentioned in the first lease was still existing,

Held, that the surrender was inoperative, and the first lease remained in force ; and this, whether the second lease, at the time of the demise, was void or only voidable at the will of the tenant for life, and whether the surrender was implied or express : the ground of decision being that the new lease did not pass an interest according to the contract, and therefore the acceptance of it, though with express words as above stated, did not effect an absolute surrender.

EJECTMENT for messuages and land in Devonshire. On the trial, before COLERIDGE, J., at the Devonshire Spring assizes, 1845, the material facts appeared to be as follows.

On September 29th, 1755, Charles, then Earl of Egremont, being seised in fee of the premises, demised them to Richard Courtenay (grandfather of the defendant) for a term of ninety-nine years, determinable on the deaths of the said Richard Courtenay and of Betty Hill. When the present action was brought, Richard Courtenay was dead. It did not appear at the trial that Betty Hill was not still living.

The said Charles, Earl of Egremont, by his will, executed in 1761, devised the premises in question, among others, to his second son Percy Charles Wyndham and his assigns for life, remainder to the first and other sons of P. C. Wyndham respectively in tail male, remainder to other sons of the testator successively for life, with remainder, on each life estate, to the first and other sons of the tenant for life, successively, in tail male.(a) In the will was contained a power to each *tenant for life to grant leases, under certain restrictions.(b) The testator [*702]

(a) See a more complete statement of the devise, and other particulars relating to the family in Doe dem. The Earl of Egremont v. Forwood, 3 Q. B. 627.

(b) See p. 639, ante ; and Doe dem. Lord Egremont v. Stephens, 6 Q. B. 208, 210, where the power is set out at length.

died in 1763; and thereupon Percy Charles Wyndham entered into possession.

In July 1785, Percy Charles Wyndham demised the premises to the said Richard Courtenay for ninety-nine years from the expiration of the former term, if the now defendant should so long live.

And on the 25th March, 1812, the said Percy Charles Wyndham demised the same premises to the defendant for ninety-nine years after the expiration or determination of the term created by the lease of 1785, if two children (named) of the defendant, or either of them, should so long live. This last lease purported to be granted in consideration of the surrendering up into the hands of the lessor by the lessee, at or before the delivery of this lease, a certain lease dated on or about the 29th day of September, 1755, granted of the premises hereby demised for the term of ninety-nine years now determinable on the death of Betty Hill, daughter of Thomas Hill: "which surrender is hereby made and accepted accordingly;" and in consideration also of 240*l*.

Percy Charles Wyndham died in 1833; and the lessor of the plaintiff succeeded him as tenant in tail male under the will.

The leases of 1785 and 1812 were not valid executions of the power; and the lessor of the plaintiff contended that the lease of 1755, having been surrendered, was no bar to his claim, though it did not appear that one of the lives on which that lease had depended might not still exist. COLERIDGE, J., directed a verdict for the plaintiff, but reserved leave to *704] move for a nonsuit: and *Kinglake*, Serjt., in Easter term, 1845, obtained a rule nisi accordingly on this point, and on another which it is unnecessary to state, as the Court gave no decision upon it. In Easter term, 1846,(a)

Crowder, *Montague Smith*, and *Phinn* showed cause. Doe dem. The Earl of Egremont v. Forwood, 3 Q. B. 627, is in point and must govern this case. In Roe dem. Earl of Berkeley v. Archbishop of York, 6 East, 86, cited in that case (as it will be here), there was nothing to show a surrender but a recital in the substituted lease that it was granted "for and in consideration of the surrender of the said first-mentioned indenture." In Doe dem. The Earl of Egremont v. Forwood the corresponding words were "for the consideration of the surrender of the present lease," "and which is hereby surrendered accordingly." In the present case the consideration is a surrender "which surrender is hereby made and accepted accordingly." It therefore, as well as Doe dem. The Earl of Egremont v. Forwood, is within the reason of the decision in Doe dem. The Bishop of Rochester v. Bridges, 1 B. & Ad. 347. It is true that in Roe dem. Earl of Berkeley v. Archbishop of York the lease had been delivered up and cancelled; but the Court allowed no weight to this fact, inasmuch as the Statute of Frauds, 29 Car. 2, c. 3, s. 3, requires

(a) April 27th, before Lord DENMAN, C. J., WILLIAMS and COLERIDGE, Js.: and 30th, before the same Judges and PATTERSON, J. The Court heard only part of the argument against the rule on the former day.

an express surrender by deed or note in writing, and the deed containing the second lease there did "not purport in its terms to be of itself a surrender, having no words in it which" denoted or could "amount to a *yielding or rendering up of the interest." Here, by the deed [*705 itself, the surrender is made and accepted "accordingly;" which last word is noticed by PATTESON, J., in *Doe dem. The Earl of Egremont v. Forwood*, 3 Q. B. 639. [Lord DENMAN, C. J., asked if any step had been taken to bring a writ of error in that case. It was answered (by the counsel supporting the rule) that none had been taken, and the reason probably was that the last life in the lease of the defendant Forwood had dropped before the judgment in Banc.] But, further, the lease of 1812, though not executed according to the power, might be a consideration for surrendering the lease of 1755; for it was voidable only, not void; it was valid at least against the lessor himself, and might have been recognised by each of his successors.

Kinglake, Serjt., and *Merivale*, contra. The point as to the surrender was not expressly decided in *Doe dem. The Earl of Egremont v. Forwood*; and, though an inference certainly arises from the judgment that this question must have been determined in the then plaintiff's favour, several dicta of the Judges during the argument are of a contrary tendency: and Lord DENMAN, C. J., there referred to the judgment of Lord MANSFIELD, in *Zouch dem. Abbot v. Parsons*, 3 Burr. 1794, 1807, where it is said that "no surrender, express or implied, in order to, or in consideration of a new lease, would bind; if the new lease is absolutely void: for, the cause, ground, and condition of the surrender fails." That ruling agrees with the judgment in *Wilson v. Sewell*, 4 Burr. 1975, 1980, where acceptance of a lease in 1762 was *held to be an implied surrender of a lease granted in 1755, but the Court said it would have been otherwise if the lease of 1762 [*706 had not been a good lease: "for, it was not reasonable in itself, nor could it be the intent of the parties, that an acceptance of a bad lease should be an implied surrender of a good one. This is not only agreeable to principles and common sense, but has been determined; it was so resolved in the case of *Lloyde and Gregory*, 1 (W.) Jones, 405, S. C. Cro. Car. 502 (which is best reported in *Sir William Jones*, 405, 406). If a surrender is intended for a particular purpose; and that purpose the only motive of it, fails; the surrender ought to fail too." The law was laid down in the same manner in *Davison dem. Bromley v. Stanley*, 4 Burr. 2210: and, although this case and *Wilson v. Sewell*, 4 Burr. 1975, related to an implied surrender, the reasons of the Court apply also to an express one. It was suggested in *Davison dem. Bromley v. Stanley*, as in the present case, that the first lease was not absolutely void, because the lessor, when making the second lease, might pass the interest during his own life: but the argument did not prevail, and Lord MANSFIELD said, "I am very clear that the acceptance of this new lease,

which did not pass an interest according to the contract, cannot operate as a surrender of the former." There, as also in *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 86, the new lease might have operated by way of estoppel during the lessor's lifetime; but that was held not sufficient; for, if the lease could not, by its own operation, pass an interest, and was, to that intent, void, the lessee had not that which *707] he contracted for when making the surrender, and, as *was said in *Zouch dem. Abbot v. Parsons*, 3 Burr. 1807, the cause, ground, and condition of the surrender failed. Here, likewise, the lease is absolutely void in itself, though it may take effect for a time by way of estoppel. It was argued for the defendant in *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 97, that, "if a lessee accept from his lessor a second lease, whether for a longer or shorter period than the first, that may be a surrender of the first, provided the lessee take all the interest which the second lease purports to grant: and that will hold equally, according to the authorities, though the second lease were voidable, because till it be avoided, the whole interest which the lease purports to grant is in the lessee; but if the lease be absolutely void, the interest which it purports to pass, never vested in the lessee." And upon that ground the case was decided; Lord ELLENBOROUGH observing, 6 East, 108: "The parties have declared most clearly and unequivocally, that their will is, that this shall take effect by the authority or power. Whether or not this lease would operate as between the parties to it by estoppel, is not material for the present purpose to inquire; it is sufficient to warrant us in deciding for the defendant, if it did not pass an interest." *Doe dem. The Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, 860, where the surrender was held valid, differs essentially from this case; for Lord TENTERDEN there says: "The new lease is in terms precisely conformable to the intent mentioned in the deed of surrender. The surrenderor obtained exactly the lease for which he bargained, and therefore it cannot be said that the new lease is a fraud or *708] deception upon him; and if the *surrender be deemed conditional, the condition has been complied with." The lease was voidable, but, so long as it continued, it derived its effect from the estate of the grantor. Here the lease was, from the first, unsupported by any right of the grantor to make such a lease. It is true that, in that case, Lord TENTERDEN lays some stress on a distinction between an implied surrender and a surrender "in fact:" but this was not necessary to the decision; and the suggestion is not borne out by *Lloyde v. Gregory*, 1 (W.) Jones, 405, and is at variance with *Zouch dem. Abbot v. Parsons*. And, further, supposing such a distinction available, it does not appear in this case that there was any surrender in fact. According to the language of Lord ELLENBOROUGH in *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 101, the mere recital in the new lease (and here nothing more appears) that it is granted in consideration of a surrender

is no proof of the surrender. In the subsequent case of *Coupland v. Maynard*, 12 East, 184, 140, Lord ELLENBOROUGH asked: "How" "can we take this to have been an actual surrender of the term merely from the agreement to surrender, when it appears that neither of the parties acted upon that agreement?" Here, as in that case, "there were mutual acts to be done;" the lessor was to grant a valid lease according to the power, and the tenant to surrender the original lease. But, "if the principal thing to be formed, as the conveying an estate, &c., be void, further covenants which are relative and dependent thereon are so likewise:" 2 Bac. Abr. 365 (7th ed.), tit. *Covenant* (G).

Our. adv. vult.

*COLERIDGE, J., now delivered the judgment of the Court. [*709

This cause was tried before me at the Devon assizes. And, it being admitted that the lease under which the defendant had supposed himself to be in possession could not be sustained with reference to the power under which alone it could have been valid, a verdict passed for the plaintiff. But two points were made on the trial, and on motion before us for a nonsuit, which are now to be considered.

There were the counterparts of three leases produced, of the respective dates of 1755, 1785, and 1812; and the plaintiff's case was that the two latter were invalid, which was admitted, and that the last was granted in consideration of a surrender of the first, and operated as a surrender of it. This was necessary to his case, as one of the lives on which the lease of 1755 was granted was still in being, and that lease still in force unless so surrendered. But the defendant contended that the surrender, having been made only in consideration of the grant of a new valid lease, did not take effect, because the new lease was invalid. Secondly, assuming that this point should be decided against him, he contended that he had become tenant from year to year, and that his tenancy had not been determined by any good notice to quit.

Upon the first point the counsel for the plaintiff contended that it had already been decided in their favour by this Court in *Doe dem. The Earl of Egremont v. Forwood*, 8 Q. B. 627. It is remarkable that in the judgment in that case not a word is said upon this point; and what *is reported to have dropped from the Judges in the course of the argument seems against the plaintiff: but, as the judgment could [*710 not have passed for him unless the Court had thought there had been a good surrender of the valid lease, it must be taken that they did so hold under the circumstances of that case. There the former lease was particularly described in the invalid one, which was said to be granted for the consideration of the surrender of such former one (adding "which is hereby surrendered accordingly"), and of the sum of 157*l.* 10*s.* paid by the lessee to the lessor. This surrender was relied on by the counsel in that case, as being an express surrender, and taking it out of the principle of decision in *Roe dem. Earl of Berkeley v. Archbishop of*

York, 6 East, 86, and bringing it within that of *Farmer dem. Earl v. Rogers*, 2 Wils. 26. That case, however, turned on no distinction between an express and implied surrender, but on whether the note in writing there relied on was a sufficient surrender to satisfy the Statute of frauds.

Nor is there anything in the judgment in *Doe dem. The Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, a case also referred to, which points to the importance of the distinction. The surrender there of the valid lease was by a deed poll executed a few days before the invalid lease; and the consideration of such surrender was not stated to be the granting of the new lease; and, what is of more importance, the new lease, as the judgment remarks,^(a) was in terms precisely conformable to the intent mentioned in the deed poll: "The surrenderor obtained *711] exactly the lease for which he bargained, and *therefore it cannot be said that the new lease is a fraud or deception upon him; and if the surrender be deemed conditional" (i. e. on the granting of a new lease as stipulated for), "the condition has been complied with." It was said on the behalf of the defendant in the present case that the surrender in *Doe dem. Lord Egremont v. Forwood* was taken to be express, and that in the present case it was only implied; that in that case it was found that on the execution of the second the first was in fact delivered up to the lessor, but in the present no such delivery up was proved. These differences in fact were relied on to distinguish the two cases: but we think that they are not made out satisfactorily. In *Doe dem. The Earl of Egremont v. Forwood* the ground for calling the surrender express was the introduction of the words "which is hereby surrendered accordingly;" in the present case were the words "which surrender is hereby made," or equivalent words. On the words "hereby surrendered accordingly," in *Doe dem. The Earl of Egremont v. Forwood*, 3 Q. B. 639, PATTESON, J., is reported to have said "that is, on the supposition of a new lease being granted," referring to the consideration immediately before expressed. As to the delivery up of the old lease, the fact was not shown either way on the trial of the present case; nor was any point made of it on either side. But this fact can only be evidence of intention, which was not needed in this case; it will not be in itself a surrender. In *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 86, the fact existed, together with cancellation, and yet the surrender was not held complete.

*712] *But then it was said that the whole doctrine which vacated the surrender of a prior lease, whether express or implied, where the consideration was the grant of a new lease, applied only to the case where such new lease was void, and not where it was merely voidable; that here the second lease was not void, it bound the grantor, and might have been confirmed by each succeeding tenant for life to its expiration by efflux of

(a) 1 B. & Ad. 860.

time. We have had occasion to consider this doctrine in another of these cases, and to examine the decisions at some length : we will not therefore now repeat that examination, contenting ourselves with saying that the principle to be found laid down by Lord MANSFIELD in *Wilson v. Sewell*, 4 Burr. 1980, and *Davison dem. Bromley v. Stanley*, 4 Burr. 2218, seems to us the true one ; that, where the new lease does not pass an interest *according to the contract*, the acceptance of it will not operate a surrender of the former lease ; that, in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void ; and that, in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void. See *Doe dem. Biddulph v. Poole*, post, p. 718. Tried by this principle, we are, on consideration, satisfied that the lease of 1755 was not surrendered, and was a good answer to the action.

*Our decision upon this point makes it unnecessary to consider the validity of the notice to quit : and the rule for entering a non-suit will be absolute. [718 Rule absolute.(a)]

(a) See the next case, the judgment in which was delivered immediately after that in *Doe dem. Earl of Egremont v. Courtenay*.

DOE on the several demises of BIDDULPH and Others v. POOLE. *Feb. 26.*

Tenant for life, with a leasing power, demised premises, in 1784, for ninety-nine years, on three lives. In 1788, the lessee being desirous to sell his term in part of the premises, it was arranged that the lessor should grant to the intended vendee a lease of this parcel, and grant the original lessee a fresh lease of the unsold residue. Indentures of lease were executed accordingly. The fresh lease to the original lessee purported to be made in consideration of the surrender of the prior lease, and granted a term of ninety-nine years, on the same three lives, to commence from the date of the fresh lease. This lease was not a due execution of the power ; but the premises were held under it till 1845, when ejectment was brought by parties in remainder, the lives not having terminated.

Held, that the acceptance of the fresh lease, which had been avoided contrary to the intention of the parties thereto, and had thus failed to pass the interest contracted for, was not in itself a surrender of the prior lease, but worked no more than a surrender conditioned to be void if the new grant should fail.

EJECTMENT for premises in the parish of Stogursey, Somersetshire. By a judge's order, a case was stated for the opinion of this Court.

The case set forth that, in 1784, George O'Brien, Earl of Egremont, who was tenant for life with powers of leasing,(a) had demised certain

(a) Some statements in this part of the case are omitted. See ante, p. 689, and notes (b) and (c), *ibid*.

premises, and among them the premises in question, to one Symons for ninety-nine years, on three lives, the term to commence immediately after the expiration or other determination of a term of ninety-nine years granted of the same premises, also on three lives, in 1760. It was admitted, for the purposes of the case, that the lease of 1784 was a due execution of the *714] leasing power, and that one cestuy que vie was alive, and that *the lease of 1760 had determined. In 1788 Symons, the lessee, sold a parcel of the premises which were the subject of the said demises to one Acland; and it was arranged that the tenant for life should, for the purpose of effectuating the sale, grant two fresh leases, the one lease to Acland of the parcel so sold to him, and the other lease to Symons of the residue of the said premises. Accordingly, by indenture of 29th April, 1788, purporting to be made "for and in consideration of the surrendering and yielding up into the hands of the said Earl at or before the sealing and delivery of these presents" of the two prior leases, and also in consideration of 5s., &c., and for the purpose of effectuating the said agreement between Symons and Acland, and reciting that the said parcel was intended to be demised by the Earl to Acland by indenture of even date therewith, the said Earl demised the unsold residue, being the premises now in question, to Symons, for a term of ninety-nine years, to commence from the said 29th April, and determinable at the end of the same three lives as in the lease of 1784, with an apportionment of the rents and heriots. It was admitted that the lease of 1788 was not a good execution of the leasing power.

The tenant for life died in 1837. This action was brought by the devisees of the remainder-man.

The question for the opinion of the Court was, whether, as the lease of 1788 had been avoided, there was any valid surrender of the lease of 1784, so far as regarded the premises contained in the lease of 1788.

*715] The case was argued, in last Trinity term, (a) by *Crowder for the plaintiff, and Kinglake, Serjt., for the defendant.

The points discussed are so fully noticed in the judgment of the Court that a particular report of the argument is unnecessary.

The authorities cited were: For the plaintiff, Com. Dig. *Surrender* (I. 1), Shep. Touchst. 800, *Lyon v. Reed*, 13 M. & W. 285, 4 Bac. Abr. 876 (7th ed.), tit. *Leases* (S) 2, § 1, Doe dem. *The Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, and *Hamerton v. Stead*, 3 B. & C. 478. For the defendant, 7 Bac. Abr. 876, tit. *Leases* (as above), 2 Rol. Abr. 498, tit. *Surrender* (K), pl. 1, Roe dem. *Earl of Berkeley v. Archbishop of York*, 6 East, 86, *Thomas v. Cook*, 2 B. & Ald. 119, Doe dem. *The Earl of Egremont v. Forwood*, 3 Q. B. 627. (b) *Cur. adv. vult.*

(a) June 1st, 1847. Before Lord DENMAN, C. J., PATTERSON, COLMERIDGE, and ERLE, J.

(b) Crowder, for the plaintiff, admitted that the present case differed from Doe dem. *The Earl of Egremont v. Forwood*, inasmuch as the substituted indenture of lease there not only purported to be granted in consideration of a surrender of the former lease, but also stated it to be "harcly surrendered accordingly."

ERLE, J., now delivered the judgment of the Court.

In this case it appears that before 1788 the premises in question, with a parcel mentioned below, were held under two leases, for ninety-nine years, determinable at the end of three lives; and that in 1788 the lessee had sold that parcel to one Acland, and wished to surrender it to the reversioner, so that he might lease it to Acland, which lease was to be made at the same time as the lease in question. It further appeared that by lease of 1788, stated by way of recital to be made in consideration of the lessee surrendering the two *former leases, and in [*716 order to effectuate his agreement with Acland, the lessor demised the premises in question to the lessee for ninety-nine years determinable on the same three lives, and with an apportionment of the rents and heriots, the parcels being severed. This lease, being granted by tenant for life with power to lease, and not being a due execution of the power, was void after his death against the remainder-man, who brought ejectment; and, as the former leases are not otherwise determined, he has contended that the acceptance of the lease of 1788 was a surrender in law of the former leases then subsisting.

It was not disputed that the acceptance of a valid lease is a surrender in law of a former lease inconsistent therewith, and that the acceptance of a void lease is not, and that the acceptance of a lease made voidable upon condition may also be a surrender in law, if rendered void according to the contract. But the question has been whether acceptance of a lease which is voidable, and afterwards made void contrary to the intention of the parties thereto, and which does not pass an interest according to the contract, is still an absolute surrender in law, provided it has operated to pass any part of the term contracted for, as during the life of a lessor tenant for life, which is the present case. And we are of opinion that this question must be answered in the negative.

The doctrine of surrender implied by law was introduced for the purpose of giving effect to the intention of the parties: the surrender is presumed for the purpose of making a grant operative which otherwise would be without effect; *Thompson v. Trafford*, Poph. 8. *The [*717 surrender is in consideration of the grant; and, if the grant fails, contrary to the intention of the parties, it seems unreasonable that an absolute surrender should be presumed to have been intended.

The facts of the present case are remarkable to negative an intention to surrender, unless the new grant should be valid; the object of the parties was to sell a parcel to Acland, and to apportion the residue on the residue; and, if the lessee had assented to a demise of the parcel by the lessor to Acland, and he had accepted it, that would have been a surrender in law of the parcel by such lessee; *Walker v. Richardson*, 2 M. & W. 882; see also *Doe dem. Huddleston v. Johnston*, M'Clel. & Y. 141: also a surrender of parcel is no surrender of the residue; 2 Rol. Abr. 498, tit. *Surrender* (M), pl. 1. And an apportionment could be made

without a surrender. The lease therefore of 1788 was unnecessary: it did not substantially alter the lessee's interest in the premises, and was intended to confirm his interest under the subsisting leases. Now it is not possible to conceive a more perverted application of the doctrine of giving effect to the intention of the parties than to hold that an instrument, intended solely to confirm leases, should be effective solely to destroy them.

It has been objected that the surrender must have been absolute if the second lease has been valid for any time, because two valid leases for the same term cannot coexist: but the objection does not arise if the surrender of the first lease be held to be conditional; and this, we think, is the true construction.

*718] That an express surrender may be on condition *either precedent or subsequent, is clear upon the authorities, as, if it be with reservation of rent, and conditioned to be void if the rent be not paid; Shep. Touchst. 307. "A condition annexed to a surrender may revest the particular estate, because the surrender is conditional;" Co. Lit. 218 b.

This being so as to express surrenders, we can discover no reason why an implied surrender may not also be taken to be conditioned to be void on a given event. As the surrender is by implication only, it is equally open to imply a conditional or an absolute surrender: and, where the implication of a conditional surrender prevents injustice and gives effect to the real intention of the parties, the true spirit of the law requires that implication to be made, and forbids an implication leading to the contrary consequences. The implication of a condition, that the surrender should be void in case the new grant should fail, appears to us to be free from objection. Indeed where the terms of a lease import an express surrender solely in consideration of the new grant, we think a construction that such surrender was conditional would be warranted, and would give effect to the intention of the parties. This construction would not interfere with the mutual estoppel from a deed between lessor and lessee; the doctrine would not apply till the new term had been defeated by title paramount, and all estoppel was removed. The same results to the parties would follow if the new lease, when made void, was held to be void as a surrender, ab initio, on account of legal fraud upon the surrenderor, the lessor being taken to have asserted that he had power to make the lease, and induced the surrender upon the faith of that assertion. This *719] was *one ground of decision in Davison dem. Bromley v. Stanley, 4 Burr. 2210: but a construction that a surrender in law is conditional appears to us the preferable opinion.

The presumption in favour of this view from its justice is confirmed by decided cases. In Davison dem. Bromley v. Stanley, 4 Burr. 2210, the new lease was valid during the life of the lessor, who was tenant for life of the reversion; and it was held that the new lease was not a surrender in law of a former lease, because it did not pass an interest

according to the contract. This important decision, which is in point for the present defendant, is supported, as well on the ground that the implied surrender was conditioned to be void if the new lease should not continue according to the intention of the parties thereto, as on the ground of fraud. In *Wilson v. Sewell*, 4 Burr. 1975, 1980, the present question was discussed without being decided, as the new lease was valid; but the Court declares that, "if a surrender is intended for a particular purpose; and that purpose the only motive of it, fails; the surrender ought to fail too." Where a dean and chapter made a valid lease before the 13th Elizabeth, and granted a new lease after that statute,^(a) which was void thereby, and the question was, whether the acceptance of the second lease was a surrender in law of the former lease, it was held not: and this opinion was independent of the question whether the second lease was valid during the time of the dean who granted it or not, the Judges saying that they do not give an opinion on that point; *Lloyde v. Gregory*, 1 (W.) Jones, 405. Now, as the second lease was valid during the time of the dean who granted it (Co. Lit. 45 a), though afterwards void, this case is *also in point for the defendant. Where [720 tenant in fee leased to A. for forty-one years, and afterwards to B. for ninety-nine years, and afterwards to A. by deed for forty-one years, it was held that the acceptance of the second lease for forty-one years by A. was not a surrender in law of the first lease for forty-one years, because, if it was, the lease for ninety-nine years would make the second lease inoperative; *Watt v. Maydewell*, Hutton, 104. In note (9) to *Thursby v. Plant*, 1 Wms. Saund. 236 c. (6th ed.), it is said, "if the new lease be not a good one, if it does not pass an interest according to the contract and intention of the parties, the acceptance of it is no implied surrender;" and the above cases are cited. In *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 86, the approval of the general reasoning in *Wilson v. Sewell*, 4 Burr. 1975, and *Davison dem. Bromley v. Stanley*, 4 Burr. 2210, and also the recognition of the principle that the intention should govern according to the authorities cited in pp. 104, 105, are in support of our opinion. The judgment itself is wholly beside the present question, because it passed for the defendant on the point that the second lease was void ab initio, and it thus became unnecessary to adjudicate on the precise view now relied on by us, which was then presented to the Court by *HOLROYD* and *GIBBS*, as a second ground of defence, with much clearness.

The authorities relied on in that and other cases, to prove a surrender to be absolute in case an interest however small has passed, are reduced in importance on close consideration. There are numerous dicta by learned Judges and in text writers; but, with the *exception of [721 *Whitley v. Gough*, 2 Dyer, 140 b, there does not appear any decision on the point; and, even in that case, the facts are so scantily

(a) 13 Elis. c. 10, s. 3.

reported as to leave it uncertain whether the point arose at all. There husband leased for ninety years by deed, and assigned the reversion so as to vest it in himself and wife, and afterwards leased for eighteen years by parol, and died; and his widow sued the lessee in trespass; and it was held that the acceptance of the second lease was a surrender in law of the first, though by parol and for a shorter term. If the action was brought before the expiration of the eighteen years, this case would be in point for the present plaintiff: but it is consistent with the statement of facts and of the points decided that the action may have been after the eighteen years, and after the lessee had had the term he contracted for; and it would then be irrelevant. The digests into which this case has been adopted throw no light on this question of fact. In *Fulmerston v. Steward*, Plowd. 102, the second lease of sixty years was made void as to all beyond twenty-one years by the retrospective effect of stat. 31 H. 8, c. 13, sect. 5: still it was held to be a surrender in law of a former lease for sixty years. But both leases were, when made, valid; and there is no analogy between the avoidance of a valid lease, without breach of contract, by a retrospective statute, and the avoidance of a voidable lease, contrary to the contract, from the failure of the title of the lessor. In *Mellows v. May* (Cro. Eliz. 873; S. C. Moore, 636), as reported in Cro. Eliz., there was a lease to baron and feme for lives, and afterwards baron *722] and feme and son accepted another lease for lives; and it is said that the second lease was void ab initio, being to commence *a die indenturæ*, and still was valid as a surrender of the first lease. But this report is of no weight, both from the unsoundness of the position itself that a void lease involves a surrender (see *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 86), and also because in the report of the same case in Moore, 636, the second lease is stated to have been held valid, in which case of course it involved a surrender in law. *Fludd v. Gregory*, 2 Roll. Abr. 495, tit. *Surrender* (F), pl. 7, is the case reported by Sir William Jones,^(a) as *Lloyde v. Gregory*; and the report of that Judge, as before mentioned, does not bear out the statement, in Rolle, that a voidable lease, if made void, is a surrender. In *Shep. Touchst.* 301, it is said that the acceptance of a second lease is a surrender, though it be avoidable, as if it be upon condition which happens, or if it be made by tenant in tail, or the like. In the first case the lease, avoidable according to the contract of the lessee, would be a surrender: but, in the second case, if it was made void contrary to the contract, it would raise the present question, and Sheppard cites for that position only *Whitley v. Gough*, 2 Dyer, 140 b. In *Willis and Whitewood's Case*, 1 Leon. 322,^(b) the question was, whether lease by tenant in fee of socage lands was surrendered in law by accepting a new lease from the guardian in socage; and two justices against one held that the first lease was determined, though not surrendered: but enough particulars are not reported

(a) 1 (W.) Jones, 405.

(b) See Anonymous case, 4 Leon. 161.

to decide whether the lessee knew what the interest of the guardian was, and had that *which he contracted for. In *Lane's Case*, 2 Rep. 16 b, *Ive's Case*, 5 Rep. 11 a, and *Thompson v. Trafford*, Poph. [*723 8, the second estate was valid, and so the question was not raised. In an Anonymous (a) case in Cary's reports, the abstract of an application to Chancery for a specific performance of an agreement for the first lease is too short to ascertain its application to the present question. These are the earlier cases which have been heretofore referred to in support of the point now relied on for the plaintiff.

In *Doe dem. The Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, there was an express surrender by separate deed at a different time, and the lessee is stated to have had that which he contracted for: in *Doe dem. The Earl of Egremont v. Forwood*, 3 Q. B. 627, there was also an express surrender in the lease in consideration of its grant. These cases, therefore, might be distinguished from the present on the ground that the new leases were founded on express and not implied surrender. But the general reasoning above mentioned would lead to a different decision of the latter case. The nature of the transaction, and the intention of the parties, is really the same, whether those expressions of surrender are added in the lease or not; and the principle of Lord MANSFIELD'S judgment extends equally to surrenders so expressed and to surrenders implied by law: and accordingly this case has been reconsidered in the present term in *Doe dem. Earl of Egremont v. Courtenay*, ante, p. 702.

The hardship resulting from a strict application of what was supposed to be the rule led us to doubt the *correctness of that supposition, and to review the authorities cited for it: and our inquiry [*724 has led us to the conclusion that the position which would produce such a result is not supported by law.

The case for the plaintiff consequently fails; and our judgment is for the defendant.

Judgment for the defendant. (b)

(a) Cary, 21 (ed. 1650).

(b) Reported by H. Davison, Esq.

LEWIS v. HARRIS. Feb. 26.

Plea, in assumpsit, that, after the accruing, &c., and before the commencement, &c., to wit, 16th June, 1843, defendant, not being a trader within the meaning, &c., and having resided twelve months in London, under and by virtue, and according to the directions, of stat. 5 & 6 Vict. c. 116, duly presented his petition for relief to the Court of Bankruptcy in London for protection from process, with a full and true schedule of his debts annexed, which schedule and petition were pursuant to and duly contained all the matters in that behalf mentioned in the statute; and the petition was, duly and according to the statute, filed of record in that Court; and such proceedings were thereupon there had, pursuant to the statute and in all respects conformably thereto, that afterwards, and before the commencement, &c., to wit, 28th August, 1843, according to the form of the statute, and pursuant thereto, a final order for protection and distribution was made by a commissioner duly authorised in that behalf: that is to say, such final order as

aforesaid was made by F., one of the commissioners of the said Court, duly authorized in that behalf, for the protection of the person of defendant from all process, and for vesting the estate and effects of defendant in A., one of the official assignees of the Court of Bankruptcy: that the debt in the declaration arose before the filing the petition, and that the order was still in force.

On special demurrer:

Held a good plea, under sect. 10, though it did not state a vesting in a creditors' assignee as well as the official assignee, according to sect. 4, nor account for such assignee not being mentioned. And this, assuming that the part following *that is to say* could not be rejected as surplusage.

ASSUMPSIT. The first three counts were respectively on three bills of exchange drawn by plaintiff and accepted by defendant: there were also counts for money lent and on an account stated.

Plea (first). That after the making of the promises and accruing of the causes of action, and before the commencement of this suit, to wit, on *725] 16th June, 1843, *defendant, not being a trader within the meaning of the statutes in force relating to bankrupts at the time of the making and passing of the act of parliament hereinafter mentioned, and having resided twelve calendar months in London, under and by virtue of, and according to the directions and provisions of, a certain statute, &c. (5 & 6 Vict. c. 116), "for the relief of insolvent debtors," duly presented his petition for protection from process to the Court of Bankruptcy in London; which said petition, &c. (averring that the petition had annexed to it a full and true schedule of defendant's debts; and that the schedule and petition were pursuant to, and then duly contained all the matters in that behalf mentioned in, the statute); and the same petition, bearing date, to wit, 16th June, 1843, was forthwith afterwards, to wit, on the day and year last aforesaid, duly and according to the statute, filed of record in the Court of Bankruptcy: and that such proceedings were thereupon had in the same Court, upon the said petition of defendant, pursuant to the said statute, and in all respects conformably thereto, that afterwards, and before the commencement of this suit, to wit, on the 28th day of August, 1843, according to the form of the said statute, and pursuant thereto, a final order for protection and distribution was made by a commissioner duly authorized in that behalf: *that is to say*, such final order as aforesaid was then made by Robert George Cecil Fane, Esq., one of the commissioners of the said Court of Bankruptcy duly authorized in that behalf, for the protection of the person of the defendant from all process, and for the vesting of the estate and effects of the defendant in Thomas Massa Alsager, one of the *726] *official assignees of the said Court of Bankruptcy. That the several debts in the declaration mentioned, and each and every of them, were contracted, and the causes of action in the declaration mentioned arose, before the said date of the said filing of the said petition; and that the said order and discharge still remain in full force, and in all respects valid in law. Verification.

Demurrer, assigning for cause that it is alleged in the plea that a final

order for protection and distribution was made by a certain commissioner of bankruptcy therein mentioned, whereas no power or authority was given to such commissioner by the statute in the said plea mentioned to make any order whatever for distribution as in the plea mentioned, but merely an order for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who might attend before the commissioner on a certain day, and for carrying into effect such proposal as the petitioner should have set forth in his petition. Other causes were assigned, on which no judgment was pronounced.

Joinder in demurrer.

The demurrer was argued in last Michaelmas term.(a)

Archbold, for the plaintiff. Sect. 10 of stat. 5 & 6 Vict. c. 116, gives a form of plea for a case like the present: but, that form not having been pursued, the question is, whether the allegations show a defence. [ERLE, J. You can scarcely say that section 10 gives a *form; [*727 it rather states the requisites of the plea.] In *Leaf v. Robson*, [13 M. & W. 651, it was held that a plea, setting up the defence given by sect. 4, must show all the requisites of that section to have been complied with, or else must strictly follow sect. 10. *Sheen v. Garrett*, 6 Bing. 686, was a similar decision as to a plea of bankruptcy. Now sect. 4 directs that the final order "shall be" for the protection of the person from process, "and" for vesting the estate and effects in the official assignee, "together with" a creditors' assignee, or for carrying into effect any proposal of the petitioner set forth in his petition. But the order, as described in the plea, is only for protection of the person and for vesting the estate in the official assignee. This fault occurred in the plea in *Nicholls v. Payne*, 7 Man. & G. 927, and appears to have been considered fatal by the Court of Common Pleas, as far as respects sect. 4. [ERLE, J. The counsel for the defendant there consented to amend. WIGHTMAN, J. Suppose a plea, following sect. 10, to be traversed: would the defendant succeed by showing such an order as the plea here describes?] He would not: it is not a final order for protection and distribution, in the statutory sense. [COLERIDGE, J. Suppose no creditors attended.] The order then would be free from this objection; that would arise upon the evidence: here nothing is pleaded to meet the objection. Further, the plea does not show that the notice was given in the London Gazette, &c., as required by sect. 1. Again, the final order is said to have been made "to wit, on the 28th day of August, 1843." Unless this be a direct allegation of the real time, there is nothing to show that stat. *7 & 8 Vict. c. 96, had not come into effect; in which case, the petition ought to have been [*728

(a) November 12th, 1847. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, J.

in the form given by the latter statute. And, under that statute, the final order is not pleadable in bar; *Toomer v. Gingell*, 3 Com. B. 322. [COLERIDGE, J. If the time be material, it is sufficiently alleged under a *videlicet*.] That rule will not apply to a plea which relies upon the process of an inferior Court, where everything necessary to give jurisdiction should be expressly shown.

Cowling, *contra*. As to the last point: stat. 7 & 8 Vict. c. 96, applies only to petitions filed after that act came into effect, that is, after 9th August, 1844; and nothing appears showing this petition to have been filed after that day. The plea is good under sect. 10 of stat. 5 & 6 Vict. c. 116; although it would not be a good plea independently of that section, and under sect. 4. Sect. 10, however, does not prescribe a form of pleading, and in that respect differs from sect. 126 of the Bankrupt Act, 6 G. 4, c. 16, to which reference has been made. All that sect. 10 of stat. 5 & 6 Vict. c. 116, shows is, what matter, if found, shall be sufficient for a defence: the language, for instance the expression "such petition," shows that it was not intended that the words should be followed. It is only the addition of matter which destroys the defence that could vitiate the plea. In *Leaf v. Robson*, 13 M. & W. 651, the plea did not contain the allegations, which are in this plea, that the petition, proceedings, and order were according to the form and effect of the statute, and in pursuance of and conformity with it. That case, as well as another not reported, *Beadle v. Snelling*, were cited in *Cook v. *Henson*, 1 Com. B. 908, where the Court of Common Pleas held *729] a plea good which was less full than the plea here. Also, in *Leaf v. Robson*, the plea did not allege that the order made was a final one; and, under sect. 1 of stat. 5 & 6 Vict. c. 116, there may be an interim order for protection. In the present plea, all that follows the last allegation of conformity with the statute is laid under a *videlicet*, and may be rejected. But, further, the commissioner had power to grant such an order as is here set out unless creditors attended: if they did attend, that is affirmative matter which should be replied. But in fact the plea does allege a final order for protection *and distribution*, which is enough, even if creditors did attend. If the final order was wrong, it might have been rescinded under sect. 12. In *Gillon v. Deare*, 2 Com. B. 309, the plea did negative the choosing of a creditors' assignee, but was held bad for not being shaped according to sect. 10.

Archbold, in reply. The matter following the words "that is to say" explains what precedes, and cannot be rejected: and it shows an order which, *primâ facie*, is not the order prescribed by the statute. To get rid of the *primâ facie* defect, other matter should be alleged by the party relying on the order. In *Gillon v. Deare* that was done: the plea was held bad on other grounds. The plea in *Cook v. Henson* followed sect. 10.

Cur. adv. vult.

ERLE, J., now delivered the judgment of the Court.

In this case the plea contained all that is required to make it valid under stat. 5 & 6 Vict. c. 116, s. 10 (see **Cook v. Hanson*); and also an allegation describing the final order to be for vesting the effects in the official assignee. The plaintiff contended that the plea must be taken to describe the form and effect of the final order mentioned therein; and, as, by sect. 4 of the above-mentioned statute, the effects are to be vested in an official assignee and an assignee to be chosen by the creditors, a final order, as stated in the plea, would be void both in form and effect; see *Nicholls v. Payne*, 7 Man. & G. 934, 5. [*730]

But it appears to us that the plea is valid. The description of the final order does not purport to set out the form: and, although we have no judicial knowledge of any forms settled under the regulations authorised by sect. 18 of the statute, still it is obvious that a final order may be silent as to the vesting of the effects, and may leave that consequence to follow by force of the statute; and that therefore the plea may only describe the effect of the final order.

Then, with respect to the effect; stat. 7 & 8 Vict. c. 96, s. 10, enacting that the official assignee shall have all rights alone until a creditors' assignee is chosen, shows that a final order may have the effect stated in this plea. And, as in many cases of insolvency no creditors' assignee is ever chosen, perhaps the majority of final orders operates in the way here pleaded.

These objections fail: and it is therefore not necessary to resort to the further answer that, as the plea is complete and valid if the objectionable part is struck out, that part may be treated as surplusage, which does not vitiate.

Judgment for defendant.

***STEVENS v. JEACOCKE and Others.(a) Feb. 26. [*731**

By the St. Ives Bay Pilchard Fishery Act (4 & 5 Vict. c. lvii.), it is enacted that certain stoms or stations shall be bounded as there defined, and that, in cases of interference by one boat with another under specified circumstances, the fish taken by the party interfering shall be forfeited to the party interfered with, and the interfering party shall forfeit 50*l*.

Plaintiff declared in case, setting forth that, after the statute passed, he was proceeding to take fish in his proper turn and station, and would have taken them, but defendant prevented him from so doing by unlawfully and wrongfully throwing a net; and the declaration described the proceeding so as to bring it within the statutory prohibition. On motion in arrest of judgment:

Held that the declaration showed no cause of action, the plaintiff stating no interference with any common law right, and the statute having only imposed a particular penalty for the act done, and having therefore given no general right of action.

CASE. The declaration charged that, whereas plaintiff, before and at the time of the committing, &c., and after the passing of an act, &c. (4

(a) See *Young v. Hiehens*, 6 Q. B. 606.

& 5 Vict. c. lvii., local and personal, public (a)), and after 1st July, 1841,
 *732] *was the owner of a certain seyne boat, to wit a seyne boat called
 the Alert, and of a certain seyne net, tow rope and warp rope, to

(a) "To repeal an act passed," &c. (16 G. 3, c. 36), "for the encouragement and improvement of the pilchard fishery carried on within the Bay of St. Ives in the county of Cornwall; and to make other provisions in lieu thereof." (Royal Assent, 21st June, 1841.)

Sect. 1 repeals the former act, except as to penalties incurred and actions, &c., commenced.

Sect. 2 enacts "that the six several stems or stations for taking fish within the said bay of Saint Ives, respectively called or known by the names of" "the Poll," &c. (naming five others), shall be bounded as there defined.

Sect. 5 enacts "that in case any boat, holding or assuming to hold any turn or stem on any of the said stems or stations, shall, in pursuit of fish or otherwise, row or pass into any other stem or station, except in the cases permitted or provided by this act, the master seynier and bowman of such boat shall for such offence forfeit any sum not exceeding the sum of 10*l.* each."

Sect. 17 enacts "that no boat having or holding a second or other subsequent turn or stem upon any of the aforesaid six several stems or stations shall be put out to sea until every boat entitled to any prior turn or stem upon that station shall respectively have shot out all her seyne, or shall desist from shooting out the same; and that if any boat holding the second or other following turn or stem upon any of the aforesaid six several stems or stations shall be put out to sea before the boat entitled to any prior turn or stem upon such station shall have shot out her whole seyne, or, having begun to shoot, shall desist from shooting the same, the hewer or hewers of such boat shall forfeit for every such offence any sum not exceeding the sum of 10*l.*; and if any fish should be taken by such boat or seyne so put out to sea contrary to the provisions of this act, all such fish shall be forfeited to the owner or owners of the boat and seyne which shall have then landed her warp, and shall have thus become entitled to the first of such prior turns or stems."

Sect. 18 enacts "that if the warp rope of the seyne net belonging to the boat entitled to the first or any prior turn or stem upon any of the said six several stems or stations shall be landed before any other boat which may have put out to sea shall have shot out one end or part of her seyne, and any boat not entitled to any turn or stem on such station, or only entitled to some turn or stem subsequent in order to such first or other prior turn or stem, shall then shoot out her seyne after and notwithstanding the crew of such last-mentioned boat or any of them shall have been forbidden so to do by any owner of the boat entitled to such first or other prior turn or stem, or his agent or servant, or by the hewer or any of the crew thereof, or after and notwithstanding such boat entitled to such first or other prior turn or stem shall have its warp rope on shore, and shall be worked or put to sea by the hewer thereof, which shall be deemed equivalent to such forbiddal as aforesaid, then and in such case all the fish which shall be taken by such boat so shooting her seyne after and notwithstanding such forbiddal, or acts equivalent to such forbiddal, as aforesaid, shall belong and be forfeited to the owner or owners of the boat so entitled to the first or other prior turn or stem of which the warp rope shall have been so landed, and the owner and the owners of the boat out of which the seyne net shall be so shot shall also forfeit any sum not exceeding the sum of 50*l.*;" "provided always, that if any boat entitled to a subsequent turn or stem shall have shot out any part of her seyne before the warp rope of the seyne belonging to the boat entitled to any prior turn or stem on the same station shall have been landed, or before such forbiddal or acts equivalent to forbiddal as hereinbefore mentioned, then and in such case the persons belonging to the boat entitled to such subsequent turn as aforesaid may proceed in shooting out the remainder of her seyne."

Sect. 19 enacts, "that it shall not be lawful for any boat which shall have commenced to shoot her seyne by throwing overboard any part thereof, and shall have desisted from shooting the same, to resume the shooting thereof in respect to the same turn or stem, unless no other boat shall have duly taken possession of a subsequent turn or stem on the same station by landing her warp; and in case any boat, which shall have so commenced and desisted as aforesaid, shall resume the shooting of her seyne as aforesaid, after some other boat shall have duly taken possession of such subsequent turn or stem as aforesaid, the owner or owners of the boat the shooting from which of the seyne shall be so resumed shall forfeit any sum not exceeding the sum of 50*l.*, and the fish, if any be taken in the seyne whereof the shooting shall be so resumed, shall be forfeited to the owner or owners of the boat and seyne which shall be entitled to the next turn or stem on the same station: Provided always, that nothing herein contained shall be construed to prevent any boat which shall have shot her seyne net, or any part thereof, and shall again have taken her wet seyne net on board, from again shooting such seyne net without any new

the same belonging, the same then *being in all things conformable to the provisions of the said act; and plaintiff, as such owner, had for a long time after the passing, &c., and after 1st July, 1841, and before *the committing, &c., to wit, for six months, lawfully and rightfully and according in all things to the said act, employed, and at the time of the committing, &c., did still, rightfully, &c., and in all things according, &c., employ the said seyne boat and seyne net in the fishery carried on in the Bay of St. Ives, under the provision of the said act, to his great profit, &c., and did therefrom, and from the sale of the fish caught and taken by him in the said fishery, the same being fit for human food, during all the time aforesaid, derive great profit, &c. And whereas also the plaintiff, before the time of the committing, &c., to wit, on, &c., was, under and by virtue of the said act, and according to the turn, order, &c., mentioned and prescribed in the said act, lawfully and rightfully entitled, as such owner of the said seyne boat, and in respect thereof (the said seyne boat and seyne net being then duly registered in that behalf as required by the said act), to take and to have and to hold stem and turn of fishing upon one of the six several stems or stations for taking fish within the said Bay of St. Ives, in the said act mentioned, to wit, the Poll stem, subject to and next after the expiration of the stem and turn of fishing of another seyne boat, to wit, called the Paul, which last-mentioned seyne boat and its seyne net were entitled to the first turn of *fishing in the said Poll stem under the said act, to wit, on 22d November, 1845, the said seyne boat of plaintiff then having on board five men, to wit, &c. (naming them), and then having on board the said seyne net of plaintiff with warp rope and tow rope, the same

taking or registration of a turn or stem, in case no other boat registered for the same station, or entitled thereto, shall, at or before the time of such shooging, again have taken possession as aforesaid of some subsequent turn or stem."

Sect. 60. "And for the purpose of providing for the recovery of penalties or forfeitures imposed by this act, or by any by-law made in pursuance thereof, the recovery of which is not otherwise provided for, be it enacted, that every such penalty or forfeiture may be recovered by summary proceeding upon complaint made before one or more justice or justices, who shall not be interested in such penalty or forfeiture; and on the complaint being made to any such justice he shall issue a summons," &c. The section then empowers the justice or justices to proceed, upon appearance, or default after service, though no information in writing or print be exhibited; and on proof of the offence, either by confession of the party complained against, or upon the oath of one credible witness or more, "to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such costs attending the conviction as such justice or justices shall think fit."

Sect. 61 enacts that, if on such adjudication forthwith, "the amount of the penalty or forfeiture," and costs, "be not paid, the amount of such penalty and costs" shall be levied by distress by warrant of one or more justices.

Sect. 62 authorizes imprisonment of the offender on proof "that no sufficient distress can be had whereon to levy such penalty or forfeiture and costs."

Sect. 64 directs the application of any penalties or forfeiture, if not herein otherwise provided for, one half to the St. Ives fishery fund, the other half to the informer or person suing. Sect. 65 enacts that no person shall be liable to any penalty or forfeiture under this act for any offence therein made cognisable by a justice, unless "the complaint respecting such offence" be made within two months. Sect. 67, and schedule, prescribe a form of conviction for "any offence against this act." Sect. 71 gives an appeal to quarter sessions.

seyne net, warp rope and tow rope being then in all things sufficient in that behalf as required by the said act, and the said seyne net then measuring 160 fathoms, &c. (describing the fulfilment of other statutory requisites), [and] did, lawfully and rightfully and in all things according to the provisions of the said act, take his said stem or turn, &c., with and in respect of the said seyne boat and seyne net, upon the said stem, &c., called the Poll stem, and did then, to wit, at the time of taking such turn, &c., in the manner directed by the said act, duly land the warp rope of the said seyne net on the shore within the limits of the said Poll stem, and one end of the said warp rope was then actually on shore within the said limits, and then dry; and thereupon plaintiff, as such owner of the said seyne boat called, &c., and in respect thereof, became and was lawfully and rightfully entitled, under and by virtue of the said act, subject, &c. (to the turn of the boat called the Paul), to have and enjoy the benefit and advantage of fishing within the limit of such last-mentioned stem or station, to wit, the Poll stem, from the time the same turn or stem was taken by plaintiff as last aforesaid until, to wit, the hour of twelve in the succeeding night, to wit, immediately after the hour of twelve of the night of 23d November, 1845, until the hour of twelve at night of 24th of said November, upon and subject to the provisions, &c., in the said act mentioned: and whereas plaintiff, being so *786] entitled, &c., and so having taken and holding the said *turn or stem, &c., afterwards, and whilst he was so entitled, and after the expiration of the said turn of the said seyne boat called the Paul, and just before the said time when, &c., to wit, on 24th November, 1845, and before the hour of twelve in the said succeeding night, to wit, &c., and after the time of a quarter flood, and before the time of three quarters' ebb of the tide upon the said Poll station (the said five men, and the said seyne net and warp rope and tow rope, then being on board the said seyne boat of plaintiff, and the said warp rope of the said seyne net of plaintiff being then first landed and brought on shore within the limits of the said Poll stem, and then on shore and dry), did put off the said seyne boat to sea within the limits of the said Poll stem, in order to shoot the said seyne net within such limits, and to have and enjoy the said benefit, &c., to which he was lawfully, &c., under and by virtue of the said act, entitled as aforesaid; and, just after the said seyne boat had been so put off, &c., and whilst she was so at sea within the limits of the said last-mentioned stem, and whilst plaintiff was so entitled, &c., and before the committing, &c., to wit, on the said 24th, &c., and before the hour of twelve in the night of the said 24th, &c., and after the said time of a quarter flood, and before the time of three quarters' ebb, &c., plaintiff, then being so entitled and then acting, &c. (conformably to the act), was then preparing and about to cast and throw the said seyne net of plaintiff from and out of the said seyne boat of plaintiff

into the sea within the limits of the said Poll stem, in order by and with such seyne net to take, surround, and catch divers large quantities of fish, to wit, one million herrings, &c., the same being fit for human food, and of great value, to wit, &c., then being *in the sea within the limits of the said Poll stem; and plaintiff [*787 did then, acting lawfully and rightly and in all things in conformity, &c., to the said act, commence to take, surround, and capture the said fish, so then being within the limits of the said Poll stem, in and with the said seyne net, and was then, just before the committing, &c., in the course of taking, &c., the said fish in and with the said seyne net of plaintiff, and would then, but for the committing, &c., have taken, &c., the said fish, and reduced them into his lawful possession, as he was lawfully, &c., under and by virtue of the said act, entitled to do, and as he otherwise would have done, whereby great profit, &c., would have accrued to plaintiff: Yet defendants, well knowing, &c., but contriving, &c., to injure plaintiff, and to disturb him in his lawful and rightful exercise, &c., of his said employment, and of the said benefit, &c., of fishing under the said act, and to prevent plaintiff from making and completing the capture of the said fish, and to deprive him of the profit, &c., whilst plaintiff was so entitled to, and so lawfully, &c., exercising and enjoying, the said benefit, &c., of fishing as aforesaid, and just after plaintiff was preparing to take, &c., the said fish as aforesaid, to wit, on, &c., wrongfully and unlawfully and against the will of plaintiff, disturbed and obstructed plaintiff in the lawful and rightful exercise, &c., of the said benefit, &c., of fishing, to which he was then so entitled, and was so lawfully, &c., exercising, &c., and did then, unlawfully, &c., and against the will of plaintiff, cast and throw into the sea a certain seyne net, near to the said fish which plaintiff was so preparing to take, &c., and then wrongfully, &c., and against the will of plaintiff, enclosed, surrounded, and captured the said fish in and with the *said seyne net so used by [*788 defendants, and thereby, and by reason of the premises, hindered and prevented plaintiff from taking, &c., the said fish by and with the said seyne net of plaintiff, and reducing them into his lawful possession, as plaintiff was lawfully and rightfully proceeding to do under and by virtue of the said act, and as, but for the committing, &c., he ought to and otherwise would have done: whereby plaintiff lost and was deprived of the said benefit, &c., of fishing, which he was so entitled to, and was so in the lawful and rightful exercise and enjoyment of, as aforesaid, and lost and was deprived of the said fish, which he might and otherwise would have taken, &c., as aforesaid, and of the sale thereof, and divers great gains and profits, to wit, &c.

The defendants pleaded several pleas, all leading to issues of fact.

On the trial before ERLE, J., at the Cornwall summer assizes, 1846, a verdict was found for the plaintiff. In Michaelmas term, 1846, *Cockburn*

obtained a rule nisi for arresting the judgment. (a) In Michaelmas term, (b) 1847,

Crowder, Butt and Slade showed cause. The declaration discloses a good cause of action. It will be argued that sect. 18 imposes a specific penalty; and that therefore no action on the case arises upon the statute. But the penalty is cumulative. The intention of the legislature clearly *739] was to create for the *time a privilege in the nature of a several fishery. The ordinary rule, that a statute creating an offence and at the same time prescribing a specific penalty does not make the offence punishable except by that penalty, cannot be safely applied where there appears a general intention to create a species of property, though accompanied by a definite assignment of a particular remedy. The creation of a right carries with it, upon common law principles, the remedy of an action upon the case for the infringement of the right, unless there be, which there is not in this instance, a positive limitation of the remedy. Indeed, without recourse to common law principles, one remedy of sect. 18 cannot be enforced, namely the forfeiture of the fish: for no process for enforcing this forfeiture is prescribed. Even the common law remedy for this is ineffectual: the fish would be spoiled before it could be completed. Sects. 60, 61, and 62 relate only to pecuniary penalties. And the sum to be forfeited, under sect. 18, is not to exceed 50*L*, which will often be utterly inadequate as a remedy.

Cockburn and Montague Smith, contra. All the subjects of the realm have at common law a right to fish in the sea. The only question, therefore, is as to the effect of stat. 4 & 5 Vict. c. lvii. But the statute confers no property on any one: it simply regulates the course of fishing, and imposes definite penalties for any deviation from that course. That creates no right of action. As to the forfeiture of the fish, it seems to be among the forfeitures which may be summarily enforced by summons, distress and imprisonment under sections 60, 61, 62. But, if these sections apply to pecuniary penalties only, the inference is merely that one *740] punishment *imposed by the act is, through inadvertence, imperfectly provided for. This is at the utmost "a right liquidated by means of the statute," according to the expression of Lord MANSFIELD in *Rann v. Green*, 2 Cowp. 474, 476. In *The Dundalk Western Railway Company v. Tapster*, 1 Q. B. 667, a statute enabled the Company to sue for calls in the courts of record in Dublin, and gave a form of declaration; and it was holden that the Company could not bring an ordinary action of debt in this country for calls, the debt and the remedy being created by the statute, although the statute used only permissive words, "it shall be lawful for the company of directors to sue," &c. The declaration here ought to have contained the words "against the form of

(a) The rule was also for a new trial: but, the Court having pronounced no judgment on the *res* made in support of this part of the rule, the argument as to them is omitted.

) November 23d. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and KELE, JA.

the statute." In effect, the plaintiff here has recourse to the statute for his right, but to the common law for his remedy. *Cur. adv. vult.*

ERLE, J., now delivered the judgment of the Court.

This was an action for infringing a right derived to the plaintiff under the provisions of stat. 4 & 5 Vict. c. lvii., for the improvement of the pilchard fishery within the Bay of St. Ives in Cornwall. The declaration showed that the plaintiff, having the statutable right, and accordingly holding his turn in the Poll stem in that bay, and being about to enclose fish in his seyne net there, was obstructed by the defendants' capture of them in another seyne net. After verdict for the plaintiff upon the issues raised by the pleas, it has been moved, in arrest of judgment, that the declaration discloses no cause of action. And we are of opinion that this objection is well founded.

*In an ordinary case of fishing at sea, we are not aware of any action by one fisherman against another for anticipating him in [*741 a capture of fish which had not been appropriated; nor was any attempt made to maintain the case on that ground; but the case for the plaintiff was rested on the rights and duties created by the statute. The defendants answered that there was no general clause conferring the right and prohibiting infringement, but that specific infringements were prohibited, and for each case a specific penalty with a specific mode of recovering it before magistrates was provided. Thus the passing out of one stem into another, which comprises the act charged against the defendants, was so prohibited under a penalty by section 5; and the infringing the turn by boats of the same stem was prohibited by ss. 17 and 19; and, by s. 55,(a) mooring and hook fishing by other boats upon limited occasions were prohibited under penalties. And, by the 60th and following section, power to levy penalties and forfeitures by distress warrants or imprisonment was given to certain justices. That, therefore, if any infringement of a right was shown, it was one in respect of which a specific remedy had been given: and that it was a rule of law that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute.

It appears to us that the law is so, and that it governs the present case. This general doctrine was adjudged in *Underhill v. Ellicombe*, M'Lel. & Y. 450, where debt for *composition money for highway rates was held not to lie, inasmuch as the claim was given by [*742 statute, and the same statute which created it prescribed a particular remedy for its enforcement. In *Doe dem. The Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, 859, the Court say: "Where an act creates an obligation, and enforces the performance in a specific manner, we take

(a) Sect. 55 does not relate to this subject. The reference intended appears to be to sects. 47 and 48. The penalties in each case are pecuniary. It is not thought necessary to set out the sections.

it to be a general rule that performance cannot be enforced in any other manner."

Therefore judgment will be arrested.

Rule absolute for arresting judgment.

LILLEY v. ELWIN. Feb. 26.

Assumpsit. The first count stated that, in consideration that plaintiff would enter into defendant's employ, and serve him, as servant in husbandry, for a certain time, to wit, from a day named till the service should be determined by reasonable notice on either side, at 10*l.* 10*s.* per annum, defendant promised to retain plaintiff, and pay him the wages, and continue him in the service till such determination: that plaintiff entered the service, and was always ready, &c., but defendant discharged him without reasonable cause, and refused longer to retain him.

Held that proof that the plaintiff was hired generally as a labourer in husbandry did not support this count, on a plea of Non assumpsit, such hiring being in law a hiring from year to year.

To the same count defendant pleaded two justifications: first, that plaintiff, being ordered by defendant to reap a corn field till eight in the evening, refused to continue at the work after four in the evening, and, wrongfully and in breach of his duty and the command, absented himself, wherefore the defendant discharged him from his service: secondly, that plaintiff unlawfully quitted his work before it was completed, in breach of his contract, and defendant made complaint thereof before a magistrate, who found plaintiff Guilty and discharged him from the service according to stat. 4 G. 4, c. 34, s. 3. Replication, De injuriâ. Plaintiff, at the trial, set up an excuse for quitting the work, which failed in fact; and the facts in the two pleas were proved.

Held that defendant was entitled to a verdict, not only on those two pleas, but on a plea of Non assumpsit to a count in indebitatus assumpsit for work and labour, the evidence showing an open contract rescinded by the misbehaviour of plaintiff, and, therefore, no wages being due rateably.

That the replication to the second justification put in issue the misconduct of plaintiff, as alleged, as well as the magistrate's decision.

And that the facts proved did not support a plea to the first count denying the discharge by defendant.

ASSUMPSIT. The declaration stated that, on, &c., in consideration that plaintiff would enter into the employ and service of defendant, to wit, in the *capacity of a servant in husbandry, and serve him in that
*743] capacity for a certain time then understood and agreed upon between them, to wit, from the day and year aforesaid until the said service should be determined by due and reasonable notice in that behalf on either side, at and for certain reasonable hire and wages, to wit, at the rate of 10*l.* 10*s.* per annum, defendant promised to retain plaintiff in the said capacity on the said terms, and to pay him the said wages, and to continue him in such service and employ until such service and employ should be determined as aforesaid, to wit, by due and reasonable notice in that behalf as aforesaid. Averment that plaintiff entered the service in the capacity and on the terms, &c., and was always ready and willing to continue, &c. Breach, that defendant wrongfully discharged plaintiff without any previous notice, and without any reasonable or probable cause, and from thence hitherto refused any longer to retain him, &c.

Indebitatus counts for work and labour, and on an account stated. The plaintiff claimed by his particular of demand "such sum as a jury shall award to be due to the plaintiff for his services as the wagoner and servant in husbandry to the defendant from the 29th day of September, A. D. 1845, until the time of his dismissal."

Pleas. 1. Non assumpsit. (a) Issue thereon. 2. To the 1st count, that defendant did not refuse to continue plaintiff in his service, nor discharge him therefrom, in manner, &c. Issue thereon.

3. To the first count. That, before the discharge of plaintiff by defendant as in that count mentioned, to wit, on, &c., plaintiff, as [*744 such servant of defendant, &c., was directed and commanded by defendant forthwith to mow and reap the corn then standing in a certain field of defendant, and to continue so mowing and reaping the said field until the hour of eight o'clock in the evening of the said day, the same being the usual period for continuing to mow corn at the said time, and to set and place the corn so mown in shocks on the morning following; and it then became and was the duty of the said plaintiff as such servant in husbandry so to do; of all which plaintiff then had notice: but, although plaintiff, at the command of defendant, then commenced mowing and reaping the said corn so then standing in the said field, and continued so reaping and mowing the same for a portion of the said day, to wit, till the hour of four in the afternoon thereof, and although plaintiff then ought to and might and could have continued mowing and reaping the corn then standing in the said field, yet plaintiff neglected and refused to continue reaping and mowing the said corn until the said hour of eight o'clock: and, when a small quantity only of the said corn was reaped, and while a large portion, to wit, one half, of the said corn in the said field was standing unmowed and unreaped and fully fit for cutting, and whilst a long time, to wit, four hours, of the said day remained unelapsed before the said hour of eight o'clock, all which the said plaintiff then knew, he the said plaintiff refused to continue mowing or reaping that residue of the said corn, although then desired by the said defendant so to do, and, wrongfully and in breach of his said duty and of the said command of the said defendant, then quitted and absented himself from his said work, and left the said corn so standing in the said field, and then refused *to return to his said work of [*745 mowing and reaping the said corn: Wherefore defendant did then discharge plaintiff from his service and employ, as he lawfully, &c. Verification.

Plea 4. To the 1st count. That, whilst plaintiff was in the service of defendant as such servant in husbandry as aforesaid, and before and until his said discharge therefrom, plaintiff was a person so hired and employed by defendant as such servant in husbandry to serve him at the parish, &c.,

(a) To the indebitatus counts, so far as they regarded the sum of 2*l.* 5*s.*, there was a plea of payment, on which nothing turns.

in the county of Kent, and had entered upon his said service, and partly performed the said contract in the said first count mentioned: and the said plaintiff, so being such servant of the said defendant as aforesaid, at, &c., did, before his said discharge, to wit, on, &c., unlawfully quit his work in the harvest field of defendant, at the parish, &c., before the same was completed, contrary to his duty as such servant in husbandry, and in breach of his said contract: Wherefore defendant afterwards, to wit, on, &c., made his complaint thereof on oath before John Baker Sladen, Esq., one of Her Majesty's justices assigned, &c., in and for the said county: and, plaintiff then being thereupon brought before the said J. B. S., and thereupon having then admitted the truth of the complaint and charge of defendant as aforesaid, and that he the plaintiff was guilty of the same, he the said J. B. S. did, according to the statute in such case made and provided, then and there adjudge, order, and direct that the said plaintiff was guilty thereof, and that he should be forthwith discharged from the said service and employ; and refuse to suffer him to continue any longer therein: which is the same grievance, &c. Verification.

*746] *Replication to pleas 3 and 4: De injuriâ. Issue thereon. On the trial, before Lord DENMAN, C. J., at the Spring assizes for Kent, 1847, it appeared that the defendant, a farmer, hired the plaintiff as a labourer, from Michaelmas, 1845. The hiring was general as to time; and nothing was said as to notice of determining the engagement. The plaintiff was hired under the denomination of a wagoner; and the usual wages of a wagoner were 10*l.* 10*s.* for the year, payable at its expiration. During the harvest season of 1846, the plaintiff worked with the defendant's other labourers as a reaper; and the defendant required the labourers so to work from eight in the morning till eight in the evening. The plaintiff insisted that, by a custom of the country, a labourer working in harvest for these hours ought to be supplied with strong beer; and he did not dispute his liability to do the work if this rule were observed. The defendant did not supply strong beer; and, on his refusal, the plaintiff and others left their work unfinished before eight in the evening. On the next day, August 5th, 1846, the defendant refused to employ these men any longer, and laid an information against the plaintiff under stat. 4 G. 4, c. 84, s. 3, before a magistrate of the county. The parties attended before the magistrate: and he, after hearing the parties, adjudged the plaintiff guilty of absenting himself from the service, and discharged him therefrom. The magistrate's order was as follows.

"Kent, to wit.—Whereas Charles Lilley was this day brought before me, John Baker Sladen, Esq., one of Her Majesty's justices," &c., "and charged upon the oath of John Witherden Elwin, of," &c., "for that he the said C. Lilley, being a person hired and employed *by the
*747] said J. W. E. to serve him, at," &c., "in the capacity of a ser-

vant in husbandry until Michaelmas next, and having entered upon such service, and having partly performed the said contract, was, on," &c., "at," &c., "guilty of misconduct in the execution thereof, against the form of the statute in that case made and provided, for that he, the said C. Lilley, did then and there, to wit, about half past 6 o'clock in the evening of that day, unlawfully quit his work in the harvest field of him the said J. W. E.: And, the said C. Lilley now admitting to me, the said justice, the truth of the said charge, and his being guilty of the misconduct aforesaid, and it appearing to me, the said justice, that the said C. Lilley is guilty of the misconduct aforesaid, I, the said justice, do therefore, in pursuance of the statute in such case," &c., "adjudge, order, and direct that the said C. Lilley be forthwith discharged from the service and employment of the said J. W. Elwin; and the said C. Lilley is hereby discharged accordingly. Given," &c., "at," &c., "this 5th day of August, 1846. JOHN B. SLADEN."

The Lord Chief Justice stated to the jury that the plaintiff had clearly refused to continue his work; but he left it to them to say whether such other facts had been proved as made the refusal a proper ground of discharge. The jury were of opinion that the plaintiff had not absented himself unlawfully: and they found for the plaintiff on all the issues.

Shee, Serjt., in Easter term, 1847, moved (by leave reserved at the trial) for a rule to show cause why a nonsuit should not be entered, or a verdict for the *defendant on the third and fourth pleas,(a) or a new trial had. The grounds of motion will appear by the ensuing [748 argument. A rule nisi was granted. In Hilary term, 1848,(b)

M. Chambers and *Lush* showed cause. The motion for a nonsuit proceeds on the assumption that a hiring determinable on notice, as alleged in the declaration, was not proved, but a general hiring, which, according to *Fawcett v. Cash*, 5 B. & Ad. 904,(c) would be for a year absolutely. But it is always a question for the jury whether the contract was to that effect or not; *Williams v. Byrne*, 7 A. & E. 177, 182, 3; and here the jury have found, in effect, that the contract was as the declaration states it. The Court cannot judicially say the contrary. The jury may have thought, in this case of an agricultural labourer, which is not like that of ordinary servants, that a reasonable notice of determination was intended. Stat. 5 Eliz. c. 4, s. 6, expressly required "one quarter's warning given before the end of" the "term." If, however, the Court think that the contract declared upon was not made out, then no special contract is proved, and the plaintiff is entitled to recover on the indebitatus counts. Further, it is contended that the whole evidence on the third and fourth pleas bore out the defence there stated, showing that the plain-

(a) The rule was so drawn up. See the end of the case. *Shee*, Serjt., in moving, objected that the special contract declared upon was not proved.

(b) January 20th. Before Lord DENMAN, C. J., PATTON, COLERIDGE, and WIGHTMAN, Js.

(c) See *Turner v. Robinson*, *ibid.* 789.

tiff disobeyed his master's orders, and was thereupon lawfully discharged. But, first, as to the third plea: it does not appear that the commands *there said to have been broken were commands which a man

*749] hired as a wagoner was bound to obey, at least without the extra allowance of beer which the plaintiff claimed as customary. Nor was it clear that there was a wilful disobedience. (They discussed the evidence on this point.) And this (or else some moral misconduct or habitual neglect) was necessary to the defence; *Callo v. Brouncker*, 4 Car. & P. 518. That the order must be lawful and the disobedience wilful is expressly laid down in *Turner v. Mason*, 14 M. & W. 112, judgment of PARKE, B. As to the fourth plea, the verdict is conclusive. It was not enough to prove the adjudication of the magistrate. The defendant was bound to show, by evidence of the facts, that he had jurisdiction to discharge. The plea alleges that the plaintiff did "unlawfully quit his work in the harvest field" "before the same was completed, contrary to his duty as such servant in husbandry, and in breach of his said contract:" wherefore the defendant made his complaint, &c. If that averment be construed in the most literal sense, the plea is, on the face of it, bad; for a man might unlawfully quit his work for a few minutes only, without committing the offence specified in stat. 4 G. 4, c. 84, s. 3, which gives jurisdiction to the justice "if any servant in husbandry," &c., "having entered into such service shall absent himself or herself from his or her service before the term of his or her contract" "shall be completed." Quitting the work is not necessarily quitting the service. There ought to be such a withdrawing as amounts to a repudiation of the service. In *Seth Turner's Case*, 9 Q. B. 80, a conviction, though alleging in the

*750] words of sect. 3 that the party, before the term of his contract was completed, absented himself from his said service and thereby neglected to fulfil the same, was held insufficient as not showing an offence. But, if the plea here be taken in the wider sense, as averring that the plaintiff without leave and without lawful excuse absented himself from the service, there was no evidence of the fact. It does not appear on the face of the magistrate's adjudication; for that states only that he on a certain day, "about half past six o'clock," did "unlawfully quit his work in the harvest field" of his employer. Nor does it appear by the extrinsic facts stated in the inducement to plea 4: these are negated by the finding of the jury: and they were not an essential part of that plea, the substance of which was the discharge by a magistrate. [COLERIDGE, J. *Seth Turner's Case* was quite different from this. There the conviction stated only that the servant did "absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute." There was no averment showing an actual offence. And the conduct imputed here might perhaps come under the statutory description of "other misconduct" "in the execution" of the contract.] That applies to misfeasance, such as the breaking of tools,

or other mischief. Here the substance of the charge is absence, which means a total departure from the service, not quitting the work, it may be for a few minutes. [WIGHTMAN, J. That, in an ordinary case, would not be an unlawful absenting himself. COLBRIDGE, J. It might, at a particular time, be a great misconduct. For example, the wagoner's leaving his horses might cause *the upsetting of the wagon. You cannot maintain that the "misconduct" must be strictly a misfeasance.] [*751]

But, further, if the magistrate did adjudge the plaintiff guilty of absenting himself within the meaning of the statute, his right to wages is not gone. If the justice, on complaint under stat. 4 G. 4, c. 84, s. 3, finds that the servant has not fulfilled his contract, or has been guilty of any other misconduct or misdemeanour in that clause before mentioned, power is given to such justice to commit him for a time not exceeding three months to hard labour, and to abate a proportionable part of his wages during such confinement, "or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant" "from his or her contract, service, or employment." The magistrate has it in his option to take one or other of these courses; and, if he orders the servant to be discharged without adjudging that the wages shall be abated or forfeited, they are still due, and the servant may recover them, if not under his contract of hiring, at least on *indebitatus assumpsit* for his work and labour. Here the defendant and several ignorant men, his labourers, appear to have gone before the justice as a mediator; and he seems to have ordered a discharge from the service as the best termination of the difference, without intending to dispose of any claim to wages.

Shee, Serjt., and Ogle, contra. The first count is not proved: all that was established was a hiring for a year, that being the effect of a general hiring, except in the case of domestic servants; *Fawcett v. Cash*, 5 B. & Ad. 907, 8: *whereas the first count alleges a hiring determinable on reasonable notice. It would, indeed, be almost impossible to give a meaning to the words "reasonable notice" in the case of an agricultural labourer, from whom services so different are required in the course of the year. The *indebitatus* count fails, because the evidence proves a special contract, open up to the time of the discharge; and no debt would arise if the plaintiff did not discharge his part of that contract; *Smith's notes*, 2 *Smith's Lead. Ca.* 1; to *Cutter v. Powell*, 6 T. R. 320. The remuneration for the work and labour is not due till the year is out, unless the conduct of the defendant amounts to a rescinding of the contract. The *indebitatus* count must fail upon *Non assumpsit* if the defendant is entitled to a verdict on the third and fourth issues. It is urged that, under stat. 4 G. 4, c. 84, s. 8, the adjudication of the magistrate merely puts an end to the contract prospectively, and does not do away with the claim for wages for work already done. [PATT-

son, J. All that has been determined is that the magistrate cannot discharge from the service and also commit to gaol : *Lancaster v. Greaves*, 9 B. & C. 628, turned on another point.] When there is a committal, the contract is not put an end to : the right to wages will therefore remain, though the contract is suspended during the imprisonment. But the discharge puts an end to the contract, and leaves the case exactly as if there had been a dismissal by the master for lawful cause, in which case the third and fourth pleas to the first count are sustained, and the *indebitatus count is negatived. It would be very *inconvenient, and cannot have been intended by the legislature, that the dissolution of the contract by the magistrate should not be attended by the ordinary common law consequences of a rightful dismissal. It is assumed on the other side that the defendant must prove the cause of the magistrate's decision to be true in fact, as well as prove the decision itself. But the decision of itself dissolves the contract ; and, even if this be not so, the cause, namely the refusal to work, was proved, and that it was unlawful : the only answer offered was a refusal by the defendant to comply with an alleged custom, of which no proof was given. [*Lush*. The Lord Chief Justice left to the jury whether there was reasonable cause of dismissal : and they found for the plaintiff.] They were not entitled so to find, on the facts proved. It is true that there may be circumstances under which an absence from some service would not warrant the dismissal ; but the plea is inconsistent with any such circumstances, and none such were proved. The case is much stronger than *Spain v. Arnott*, 2 Stark. N. P. C. 256, or *Turner v. Mason*, 14 M. & W. 112. [*Chambers*. In *Spain v. Arnott* a juror was withdrawn.] Lord ELLENBOROUGH's judgment there is decisive. It cannot be that the pleader was bound to negative in words every conceivable excuse for absence ; it is enough that he has alleged the absence to be unlawful.

Lord DENMAN, C. J. We are considering whether the plea would not be good without any allegation of misconduct in fact, resting merely on the discharge by the magistrate.

*754] **Chambers* and *Lush* remarked that the fourth plea did not expressly show the charge ; and that in *Seth Turner's Case*, 9 Q. B. 80, the conviction was held bad for the invalidity of the information. [*COLERIDGE*, J. The fourth plea alleges the unlawful quitting of work, and that the defendant made complaint "thereof" before the magistrate.]

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

The plaintiff, in the first count, declared on a special contract of hiring, determinable on reasonable notice, and alleged a breach in discharging him without such notice. The proof was a general hiring as an agricultural labourer, a wagoner. That is, in law, a hiring for a year, and not determinable at any time on reasonable notice. This is a fatal

variance; and the defendant is entitled to a verdict on the plea of Non assumpsit, so far as regards the first count.

There was also a traverse of the discharge, on which the plaintiff is entitled to retain the verdict.

But there were two special pleas to this count; one, the third plea, stating a discharge by the defendant for disobedience of orders in not working during harvest till eight o'clock at night: the other, the fourth plea, stating that the plaintiff unlawfully quitted his work, and a discharge by a magistrate under stat. 4 G. 4, c. 84, s. 8.

There was also a count for work and labour, to which *the [755 only plea was Non assumpsit, on which the plaintiff had a verdict.

The plaintiff had a verdict on the special pleas; but leave was given to enter a verdict for the defendant on them. It is necessary to consider those pleas, and the evidence with regard to them, not only on account of costs, but because the facts proved essentially affect the plaintiff's right to retain his verdict on the indebitatus count.

The hiring was for 10*l.* 10*s.* for the year, no part of the wages being due till the end of the year. The discharge was at the end of ten months. If the plaintiff had been guilty of disobedience of orders and unlawfully absenting himself from his work, so as to justify that discharge (assuming the defendant to have discharged the plaintiff), then, no wages being due, the plaintiff was entitled to nothing, and the indebitatus count cannot be sustained. If, on the other hand, the discharge was not justifiable, then the plaintiff was at liberty to treat that discharge as a rescinding of the contract by the defendant, and to adopt that rescinding and sue for wages pro ratâ up to the time of the unjustifiable discharge; and so to retain his verdict on the indebitatus count. We do not think it necessary to go through the authorities which establish this view of the law; they will be found collected in Mr. Smith's Leading Cases, in the notes to the case of *Cutter v. Powell*, 2 Smith's Lead. Ca. 1.

The discharge in this case was not directly by the master, the defendant, but by a magistrate, on the statute 4 G. 4, c. 84, on the complaint of the master. But we are of opinion that it is sufficiently the act of *the defendant to entitle him to a verdict on the third plea, sup- [756 posing the alleged misconduct of the plaintiff to be established, and also to entitle him to a verdict on the plea of Non assumpsit to the indebitatus count on the like supposition, because in that case he never was indebted to the plaintiff at all.

It was contended that the only material part of the fourth plea is the discharge by the magistrate, and that the alleged misconduct stated in that plea by way of inducement was not put in issue by the replication, for that the magistrate may have discharged the plaintiff on other grounds, as by way of settling the dispute in an equitable way, and so leaving the question of right to wages pro ratâ untouched. But, on

reference to the statute, it will be found that the magistrate has no jurisdiction to discharge unless it shall appear to him that the servant "shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid." So that the question on the two special pleas, and also on the plea of Non assumpsit to the indebitatus count, ultimately depends on the facts, whether they do or do not establish such misconduct of the plaintiff as justified his being discharged.

The plaintiff was engaged as a wagoner, but, during the harvest, worked in the field generally; and we think it must be taken as part of his contract that he should so do. The practice was, during harvest, to work till eight o'clock in the evening. The plaintiff refused to work till that hour, not as being an unreasonable hour, or as not being within the terms of his contract, but because strong beer of good quality was not *757] allowed to him according to a custom which he *alleged to exist, the beer supplied, being, as he contended, very bad small beer, not so good as water.

This supposed custom the plaintiff wholly failed to establish by evidence; and his desertion of his work was left without justification. The defendant, therefore, had a right to discharge him, and must be taken to have exercised that right by ordering him not to return, taking him before the magistrate, and acquiescing in the magistrate's order of discharge. The jury, indeed, negatived the *wrongful* absence of the plaintiff from his work, but their opinion on that point cannot do away the effect of those facts which are stated in the plea and were clearly proved.

It follows that plaintiff cannot recover for the time of his actual service on the indebitatus count, as he was bound to give a whole year's service before earning any wages, and broke his contract by leaving that service before the year's end.

Rule absolute to enter a verdict for defendant on all the issues except the second.

*758] *The QUEEN v. The Justices of WILTS. Feb. 26.

Before the passing of stat. 5 & 6 W. 4, c. 76, the borough of Marlborough maintained a gaol and bridge within the borough, and paid other of its public expenses out of a fund in the nature of a borough fund, and was for that reason exempt from county rates under stat. 55 G. 3, c. 51.

After the passing of stat. 5 & 6 W. 4, c. 76, the borough (being one of those in schedule (B.)) did not obtain any grant of a separate court of quarter sessions. The justices for the borough continued to exercise jurisdiction therein, but not in exclusion of the county justices. The borough continued to maintain the bridge and gaol out of the before-mentioned fund: and the borough treasurer paid out of that fund (under orders made at sessions and assizes) the costs of prosecutions for offences committed within the borough.

Held, that the borough was now liable to a county rate assessed by the justices of the county in quarter sessions.

A RULE nisi was obtained, in Michaelmas term 1846, on behalf of

certain inhabitants of the parish of St. Mary in the borough of Marlborough, for a certiorari to remove into this Court an order of the Wiltshire Quarter Sessions, holden in June 1846, for making and levying a county rate; and to remove also a rate endorsed on the said order, and a precept issued by the clerk of the peace by virtue of such order to the guardians of the Marlborough union, requiring them, out of the moneys in the hands of their treasurer, to pay to the treasurer of the county 200*l.* 1*s.* 3*d.*, "being the amount of the several and respective sums of money thereunder set down and expressed opposite to and against the names of the several parishes, townships, or places within their said Union, the said several sums being respectively charged and assessed thereon as the proportion of the said several parishes," &c., "towards the said general county rate so made as aforesaid: and in which said rate or assessment and precept respectively the sum of 7*l.* 7*s.* 5*d.* was set down and expressed opposite to and against the name of the said parish of St. Mary."

An affidavit by the town clerk of Marlborough, in support of the rule, stated that Marlborough was a *borough by prescription, and that its rights and privileges had been confirmed by a charter of James [*759 2, referring, by *inspeximus*, to other charters in favour of the borough: and that the borough had never, before the passing of stat. 5 & 6 W. 4, c. 76, been chargeable to the general county rate. That an indictment had been preferred, in 1829, against one of the then high constables, for disobeying an order of Sessions to levy a certain sum within the borough for the purposes of the county rate: that a verdict of Guilty was found, subject to the opinion of this Court on a special case: and that, on argument of the case, it was ordered that a verdict should be entered for the defendant, on the ground that the borough came within the proviso of stat. 55 G. 3, c. 51, s. 1.(a) The special case was annexed to the affidavit; and the deponent swore to his belief that the facts therein stated were

(a) Mich. T. 1834, *Rex v. Shepherd*, 2 A. & E. 298. It may be convenient to subjoin the special case, as there set out.

"The charter granted to the borough of Marlborough, 7th of April, 1 James 3, contains an *inspeximus* of all the preceding charters. This charter was to be considered as part of the case. The mayor and two burgesses act as justices within the borough; the county magistrates exercise no jurisdiction within it. The practice is, and has always been, to cause the warrants of the county magistrates to be backed by the borough justices. The borough justices hold sessions every quarter at the Guildhall of the borough, and try misdemeanors. There is a borough gaol, and prisoners are occasionally placed there previous to examination. A doctor is paid for attending the poor for casualties, and for attending on the prisoners. The expense of keeping up this gaol is borne by the borough. If prisoners are to be tried at the borough sessions, or are to remain in custody for any time, they are sent to a county prison, situate within the borough. It is the bridewell of the county of Wilts; the expense of maintaining them there is paid by the borough, whenever the gaoler of the bridewell sends in the account, which he does quarterly. The borough pays him a salary, and he is also paid a salary by the county; he is appointed by the county justices. When persons are charged with felonies committed within the borough, they are generally sent to the county bridewell within the borough, for trial at the county assizes; but when the offences charged are heavy, the prisoners are sent at once to the county gaol at Flibberton, near Salisbury, for trial at the assizes: the borough pays the expense of conveying them there, but the expense of maintaining them in the county gaol until the assizes, and of

true, and that the case truly set forth the usages and practice of the mayor and burgesses until the coming into operation of stat. 5 & 6 W. 4,
 *760] *c. 76. The affidavit went on to state that, from and after that time, the justices for the borough have continued to exercise juris-
 *761] diction within the borough, but not in *exclusion of the justices for the county; that no general or quarter sessions of the peace have been held in and for the borough: and that the county justices have claimed to exercise, and have exercised, jurisdiction in and for the borough in the following respects, namely: their warrants have been executed in the borough without being backed by the borough justices; the county

conveying them from the county bridewell to the assizes, is borne by the county. The borough pays the expense of passing vagrants: the mayor acts as coroner within the borough; the expense of inquests is borne by the borough. There is a bridge within the borough, the expense of repairing which is borne by the borough. The corporation has lands within the borough. A rate is generally made once a year upon the two parishes within the borough: none has been found earlier than 1775, and that rate was put in on behalf of the defendant, and was set out in the case. It appeared to be imposed by the justices of the borough, at the borough quarter sessions; and it was a rate upon the two parishes for the purposes mentioned in the acts 12 G. 2, c. 29, and 13 G. 2, c. 18, assessing the proportion for each parish, and commanding the chief constables of the borough to demand it, and the churchwardens and overseers to pay it out of the money collected for the relief of the poor; and the chief constables were directed to pay it over to C. B., residing within the said borough and town of Marlborough, whom the said Court had appointed treasurer and receiver; with power to the high constable, in case of non-payment by the churchwardens and overseers, to levy the money by distress and sale of the goods of the said churchwardens and overseers, by warrant under the hands and seals of two or more justices of the peace of and residing in the said borough.

"Similar rates have been constantly made and paid since the making of the above. The expenses and charges before mentioned as being paid and borne by the borough, together with other expenses, are borne out of the funds so raised. An order on the borough, made by the county justices in 1819, for payment of a sum towards the county rate, was appealed against and quashed. No county rate was at any other time charged on the borough, until that out of which this indictment arose.

"For the defendant there was put in an order of Court made at the assizes for the county of Wilts, 6th March, 1825, ordering the churchwardens and overseers of the parishes in the borough to pay to the prosecutor of a person convicted, before the Court, of felony committed within the borough, a specified amount for expenses and loss of time. Whether any payment was made under this order, did not appear. The prosecutor having applied for his expenses of this prosecution to be paid out of the county rate, the application was resisted by the county justices; and, it appearing that the felony was committed within the borough of Marlborough, which did not contribute to the county rate, the Judge made no order on the county.

"The corporation of Marlborough furnish their own town-hall, in which the business of the county quarter sessions, as well as their own, has always been conducted."

The charter of James, annexed to the case, recited, among other prior charters, one of 18 Eliz., a translation of which was also annexed to the town-clerk's affidavit in support of the present rule. This charter ratified those preceding; incorporated the mayor and burgesses; granted to them and their successors to have a gaol within the borough for persons by them to be apprehended therein; authorized them to commit persons apprehended for felony, &c., within the borough to the county gaol; empowered them to make by-laws for purposes of government, &c., within the borough, to hold courts leet, of pie-poudre, &c., and to have fines, waifs, goods of felons, and other profits; ordained that the mayor and two other burgesses for the time being should be justices of the peace for the borough (but should not proceed to the determination of any felony without special mandate from the Crown); that the mayor for the time being should be escheator, coroner, and clerk of the market: "And that no other justice, escheator, coroner, or clerk of the market, of us, our heirs, or successors, into the said borough or precinct of the same, do in any manner enter or admit himself there to do and perform anything there which to the office of justice, escheator, coroner, or clerk of the market, pertains, there to be done and performed." (See also, as to the charters, 2 A. & E. 301-304.)

*justices have held and been accustomed to hold petty sessions of the peace for the division in which they act in the borough; [*762 and persons charged with offences within the borough have been occasionally, and at the option of the complainants, taken for examination before the county justices, though such cases are still for the most part disposed of by the justices for the borough.

It was further deposed that, after the passing of the said act, and in pursuance thereof, the council of the borough contracted with the justices having authority over the gaols of the county for the support and maintenance in the said gaols respectively of prisoners committed thereto from the borough: that the borough treasurer, in pursuance of such contract, has from time to time paid the county treasurer for the conveyance of such prisoners to the said gaols and their maintenance there, which payments have been made "out of a fund consisting of the rents and profits of certain hereditaments, together with other moneys, now applicable to and constituting the borough fund of the said borough."

That, from the time when the act came into operation, the expenses of prosecutions for offences committed in the borough have been paid by the borough treasurer out of the said fund, under orders made by the county justices in quarter sessions and the justices of assize respectively: and that, since the passing of the act, the expenses of maintaining the borough gaol and the bridge situate in the borough (both mentioned in the special case) have been defrayed out of the same fund.

That, from the time of the judgment in *Rex v. Shepherd*, 2 A. & E. 298, till the making of the order next mentioned, *the inhabitants of the borough have been exempt from county rates: that, at the [*763 last April quarter sessions for the county (1846), the justices made an order for assessing a general county rate on every parish, &c., in the county, and assessed a certain sum upon the parish of St. Mary as its quota, but no part of it was levied: and that the county justices, at their ensuing (June) quarter sessions, ordered another county rate, and assessed 7l. 7s. 5d. as the quota of the parish of St. Mary, from payment of which they now claimed exemption.

The clerk of the peace for the county made affidavit in answer, stating that, as he was informed and believed, judgment was given for the defendant in *Rex v. Shepherd*, "on the ground that the borough of Marlborough was a place having a separate jurisdiction derived from charter, and was, before the passing of" stat. 55 G. 3, c. 51, "subject to the payment of rates in the nature of county rates, imposed and assessed by its own justices." That Marlborough was one of the boroughs in schedule (B.) Sect. 2, of stat. 5 & 6 W. 4, c. 76, which were not to have a separate commission of the peace unless upon petition: and that it had never applied for a separate court of quarter sessions, and remained still without any court of general or quarter sessions.

The affidavit then recited sect. 1 of stat. 5 & 6 W. 4, c. 76, which
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repeals "so much of all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters patent now in force relating *764] to the several boroughs named in the schedules (A.) and (B.) *to this act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this act:" and sect. 111, which enacts that the justices of the peace "in and for the county in which any borough is situated, to which His Majesty shall not have granted that a separate court of quarter sessions of the peace shall be holden in and for the same, shall exercise the jurisdiction of justices of the peace in and for such borough as fully as by law they and each of them can or ought to do in and for the said county."

It further stated that the contract for maintenance of prisoners from the borough in the county gaols (referred to by affidavit on the other side) had been entered into by the county justices inadvertently, and was, as the deponent believed, unwarranted by law. And that, as deponent believed, the assessment made on the parish of St. Mary in April, 1846, was not yet paid, the overseers having protested against it and given the Court of Quarter sessions to understand that they should take the opinion of this Court on their liability.

In Michaelmas term, 1847, (a)

Cockburn, Slade, and Swayne showed cause, and contended that, although the inhabitants of Marlborough had (in *Rex v. Shepherd*, 2 A. & E. 298), been considered exempt from county rate under stat. 55 *765] G. 3, c. 51, because they *were subject to rates in the nature of county rates, assessed by their own justices, that exemption was taken away by stat. 5 & 6 W. 4, c. 76. They referred in particular to sects. 111 and 112: and they relied on *Rex v. Hayward*, 6 A. & E. 590, and cited also *Rex v. Clarke*, 5 B. & Ald. 665, *Mercer v. Davis*, 10 B. & C. 617, *Weatherhead v. Drewry*, 11 East, 168, and *Bates v. Winstanley*, 4 M. & S. 429.

Sir *J. Jervis*, Attorney-General, and *Hodges*, contra, contended that the effect of stat. 4 & 5 W. 4, c. 76, was not to take away the exemption from places which formerly possessed jurisdiction, but only to give power to the county magistrates affirmatively in the cases specified; and, further, that power of taxation must be given directly and not incidentally. They referred to the language of Lord DENMAN, C. J., in *Regina v. Ellis*, 6 Q. B. 501, 505, to the argument in *Regina v. St. Edmund's*, Salisbury, 2 Q. B. 72, 78, and to *Regina v. New Sarum*, 7 Q. B. 941, and *Regina v. Deane*, 2 Q. B. 96; and they insisted that the material circumstances on which *Rex v. Shepherd*, 2 A. & E. 298, was decided were not altered. They also pointed out that the case was not affected by stat. 8 & 9 Vict. c. 111.

(a) November 11th. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

(The judgment of the Court makes a fuller report of the arguments unnecessary.) *Cur. adv. vult.*

ERLE, J., now delivered judgment.

In this case a rule for a certiorari to remove a county *rate was moved for on behalf of certain inhabitants of a parish in [766 Marlborough, on the ground that the borough of Marlborough was not liable to be assessed to the county rate. It appears by the affidavits that, before the passing of stat. 5 & 6 W. 4, c. 76, there were justices for the borough under the charter, the county justices being excluded, and a gaol, and a rate in the nature of a county rate: and the borough was held not liable to the county rate in *Rex v. Shepherd*. Since stat. 5 & 6 W. 4, c. 76, this, being one of the boroughs in schedule (B) of that act, has had no grant of a separate commission of the peace or of a Court of Quarter sessions, but the borough magistrates have acted concurrently with the justices of the county in respect of some criminal matters, and the Town council have maintained a gaol and repaired a bridge, and made a contract with the county in respect of prisoners: and, upon these facts, the question is whether the borough is liable to be assessed to the county rate by the justices for the county.

Before stat. 12 G. 2, c. 29, there were numerous subjects for a county rate; and in respect of each subject a separate rate was required. By that statute a power was given to rate for the several subjects together, according to the then usual proportions; but all local exemptions were preserved. By stat. 18 G. 2, c. 18, the powers given to county justices by stat. 12 G. 2, c. 29, are given to justices of franchises exempt from the jurisdiction of the county justices. By stat. 55 G. 3, c. 51, the county rate is to be made, not *according to the proportions theretofore usual, but according to the value of the things rated; [767 and, by sect. 24, the justices of franchises not liable to the county rate made by the justices of the county have within their franchises the same powers as were given by this act to county justices within the body of the county. Under these statutes the justices for the borough under the charters made rates in the nature of county rates, and the county magistrates had no jurisdiction to rate.

Since stat. 5 & 6 W. 4, c. 76, the present mayor and his predecessor are justices for the borough.(a) But, by sect. 101, no borough justices are to act in making or levying any county rate, or rate in the nature of a county rate: and, by sect. 111, the justices of the county shall exercise the jurisdiction of justices for the borough in those boroughs to which a separate Court of Quarter sessions shall not be granted, as fully as by law they can for the county. Therefore the county justices, in respect of rating to the county rate, have the jurisdiction which the borough justices theretofore had; and they have that jurisdiction as fully as they have it for the county. The enactment is complicated; but it

(a) Sect. 57.

appears to us to give to the county justices the jurisdiction to rate this borough to the county rate.

This construction is confirmed by considering that, unless it be correct, the borough would be exempt from at all contributing to the county rate. It is further confirmed by the provisions as to county rates for those boroughs to which a grant of a separate Court of Quarter sessions is made.

*768] By sect. 105, the recorder has *cognisance of all matters cognisable at quarter sessions for counties except as to making and levying county rates. By sect. 112, such boroughs, if they were before exempt from county rates, are to send copies of the grant to the clerk of the peace of the counties, and after that, the justices for the county shall not assess such boroughs to the county rate: and, by sections 113 and 117, such boroughs are to pay the expenses of their own prosecutions, and a proportion of the county rate. These provisions, for exempting this class of boroughs from county rates, which had been before exempt therefrom, upon notifying the grant of a Court of Quarter sessions, indicate that the other boroughs theretofore exempt were thereafter to lose their exemption and to be within the jurisdiction of the county justices.

The liability of this borough is not affected by the charges to which it is liable or which it has voluntarily borne for repairs and other expenses. The construction of the statutes is not altered by the subsequent acts of the parties.

We are of opinion, therefore, that the borough of Marlborough is liable to be assessed to the county rate by the county justices, and that the rule for a certiorari must be discharged. Rule discharged.

*769] *CONNOP and Another, Executors of DAVEY, v. LEVY.
Feb. 26.

Assumpsit by executors: counts: 1, for work and labour of the testator, money paid by him, and on an account stated with him; with promise to him: 2, for work and labour and money paid by plaintiffs as executors, and on an account stated with them as executors; with promise to them as executors.

Plea. That testator, in consideration of defendant consenting to act on a provisional committee for a projected railway, agreed to indemnify him from any charges on account of the railway; and the work was done and money paid by testator, and account stated with him, in respect of the same, in surveying the line; and that the work was done and moneys paid by plaintiffs in and about surveying the line, and the account was stated with them in respect of the same work, &c.: that all the causes of action accrued after the promise to indemnify; and that defendant made the promises only in his character of member of the committee: that the railway was abandoned, and the work and payments became of no value, and all sums recovered from defendant in respect thereof would be lost to defendant, and he would be damned to that extent. On special demurrer,

Held a good plea, for avoiding circuity of action, to both counts; since defendant, on the facts alleged, was entitled to recover, from testator in his life or from his representatives, as much as they would recover from him.

Another plea alleged that defendant in his lifetime caused defendant to enter into the promises by fraud. On special demurrer,

Held a good plea, not only to the first count, but also to the second, since, if defendant was induced by testator's fraud to make the original contract with him, the same fraud procured the implied promise to the executors for the work they had done and money they had paid in pursuance of that contract.

ASSUMPSIT. The first count charged that defendant, in the lifetime of the testator Davey, was indebted to Davey in 2000*l.* for work and labour done by Davey about the business of defendant at his request, and journeys, &c., by Davey about the said work, and in 2000*l.* for money paid by Davey for defendant's use, and in 2000*l.* for money found due from defendant to Davey on an account stated between them; and that defendant, in consideration of the premises, in the lifetime of Davey, promised Davey to pay him on request.

The second count charged that, after the decease of Davey, defendant was indebted to plaintiffs, as executors, in 2000*l.*, for the work and labour of plaintiffs, as such executors, by them done for defendant at his request, and materials for that work found and provided by *plaintiffs, as [770 executors, for defendant at his request, and for journeys by plaintiffs, as such executors, made in and about the doing of the said work for defendant at his request, and in 2000*l.* for money by plaintiffs, as executors, paid for the use of defendant at his request, and in 2000*l.* for money found due from defendant to plaintiffs, as executors, on divers accounts stated between defendant and plaintiffs as executors; and that defendant, in consideration of the last-mentioned promises, promised plaintiffs, as executors, to pay them on request.

Breach, non-payment.

Plea 2. That, before the making of the promises in the declaration mentioned, and in the lifetime of Davey, to wit, on, &c., Davey projected a certain undertaking, to wit, an undertaking for the formation of a railway then proposed to be called the Herne Bay, Canterbury, and Dover Railway; and that Davey, being then desirous of forming a company for the purpose of carrying into effect the said undertaking, and in order to induce defendant to become a member of the provisional committee of the said projected undertaking and company, did then promise and agree to and with defendant that, in consideration that defendant would consent to act as one of the provisional committee on the said Herne Bay, &c., Railway, and such other branches as might be determined on, Davey would indemnify and save harmless defendant from any professional or other charges on account of the said railway: that defendant, then relying upon the said promise of indemnity, thereupon did consent to act as one of the said provisional committee, and then became one of the said provisional committee accordingly: that afterwards, to wit, on, &c., *another branch line of railway in connexion with the said under- [771 taking was determined on by Davey, to wit, a branch line to Sheerness; and the said undertaking was thereupon then styled The Sheerness, &c. (setting it out): that afterwards, to wit, on, &c., the name

of the said projected railway was again changed, and it was then styled The Kent and Essex Union Railway: that the said Kent and Essex Union Railway and the said Sheerness, &c., and the said Herne Bay, &c., above mentioned were one and the same undertaking, and not different undertakings: that the company then formed by Davey for carrying the said undertaking into execution was then styled The Kent and Essex Union Railway Company, and defendant then became and was a member of the provisional committee of the said Kent and Essex Union Railway Company, in pursuance of his said consent so given as aforesaid, and upon the faith of the said promise of indemnity by Davey so to defendant given as aforesaid: that the said work and labour, so alleged to have been done, and the materials for the same provided, by Davey, in the lifetime of Davey, for defendant at his request, and the said journeys, &c., so made by Davey and his assistants, and the money so paid by Davey for defendant at his request, were respectively done, provided, made, and paid by Davey in his lifetime in and about the surveying of the line of the said Kent and Essex Union Railway; and that the account in the said declaration alleged to have been stated between Davey and defendant was stated of and concerning moneys alleged to be due and owing to Davey in respect of the said work, &c., so done, &c., as aforesaid by Davey and his assistants, and of and concerning the *772] said *moneys so paid as aforesaid by Davey, in and about the surveying of the line of the said Kent, &c., Railway as aforesaid: that the said work and labour and materials, so alleged to have been done and provided by plaintiffs, as executors of Davey, since the decease of Davey, for defendant at his request, and the journeys and attendances so made, and the money so alleged to have been paid, by plaintiffs, as such executors, for defendant at his request, were respectively done, made, and paid by plaintiffs, as such executors, in and about the surveying of the line of the said Kent, &c., Railway; and that the account so alleged to have been stated between plaintiffs, as executors as aforesaid, and defendant, was stated of and concerning the said work and labour, materials, journeys, and attendances so done, &c., as aforesaid by plaintiffs as executors as aforesaid, and of and concerning the said money so paid as aforesaid by plaintiffs as executors as aforesaid, in and about the surveying of the line of the said Kent, &c., Railway: that the said work and labour were so done, and the said materials so provided, and the said journeys and attendances were so made and given, and the said money was so paid, and the said accounts were so stated, as aforesaid, by Davey in his lifetime, and by plaintiffs as his executors since his decease, respectively, after the making the said promise of indemnity so given by Davey to defendant as aforesaid, to wit, on, &c., and on divers days and times between that day and the commencement of this suit. That defendant became liable to the said professional charges in respect to the surveying of the said line of the said Kent and Essex.

Union Railway, and to the said other charges on account of the said railway, and made the said promises *in the declaration mentioned, only in his character of member of the provisional committee of the Kent and Essex Union Railway Company, and not otherwise. That, after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on, &c., the said undertaking for the formation of the said railway was wholly abandoned, and the said work and labour, journeys and attendances, which had been so made and done as aforesaid by Davey in his lifetime, and plaintiffs as his executors since his decease, and the said payment of money so made as aforesaid in Davey's lifetime, and by plaintiffs as his executors since his decease, in and about the surveying of the said line of the said Kent and Essex Union Railway, then became and were wholly useless and of no value to defendant: that any sums of money which may be paid by, or any damages which may be recovered from, defendant in respect of the said work and labour, journeys and attendances, in the declaration mentioned, so made and done as aforesaid, or in respect of the other payments in the declaration mentioned, so made as aforesaid, will be wholly lost to defendant, and defendant will be damnified to that extent; contrary to the true intent and meaning of the said agreement and promise of Davey to indemnify and save harmless the defendant. Verification.

Demurrer, assigning for causes: That the plea, if it discloses a defence, amounts to the general issue; that, if it confesses any cause of action, it does not avoid it; that it is pleaded to the whole declaration, whereas it could apply only to those counts which allege a cause of action accruing to the deceased; and that it is double and multifarious. Joinder in demurrer.

*Plea 8. That Davey in his lifetime caused and procured defendant to enter into the said promises in the declaration mentioned by means of the fraud, covin, and fraudulent misrepresentation of Davey and others in collusion with him. Verification. [774]

Demurrer, assigning for causes: That the plea professes to be pleaded to the whole declaration, whereas it is only an answer to a part; and that the plea, as compared with the declaration, is repugnant and absurd on the face of it. Joinder in demurrer.

The demurrers were argued in last Michaelmas term. (a)

Crowder, for the plaintiffs. The second plea is in the nature of a set-off: but in *Morley v. Inglis*, 4 New Ca. 58, it was decided that money due on a guarantee could not be set off in an action of debt brought by the guarantying party. But, further, the plea is pleaded, not only to the count which charges a debt to the testator, but also to that which charges a debt to the executors. Now the executors could not be liable on the guarantee unless there were assets: as to the last count,

(a) November 9th, 1847. Before Lord DENHAM, C. J., COLERIDGE, WIGHTMAN, and ELLIS, J.

therefore, the debts are not mutual. The defendant is not entitled to obtain the indemnity, except rateably with other creditors. This shows that the defence cannot be supported on the ground of preventing circuity of action, because an action by the defendant on the indemnity would not countervail the present action. Even an absolute debt from the testator could not be set off against the claim in the last count; *775] *Schofield v. Corbett*, p. 779, post.(a) *[WIGHTMAN, J. Is not the effect of the plea that the defendant was not to be called upon by the plaintiffs?] If that be so, the plea amounts to Non assumpsit; and this is assigned as a cause of demurrer.

The third plea answers the first count only. The fraud of the testator cannot affect the contract with the executors on their own behalf. The last count states no contract with the testator. He could not, by his act, cause a promise to be made to his executors after his death.

Peacock, contra. The second plea is framed for the purpose of avoiding circuity of action. It admits the fact of the defendant's promise, but shows the promise to have been made by the defendant in a particular character, and under particular circumstances, which, as the facts are, prevent the plaintiffs from enforcing the promise. Suppose a joint promise to indemnify by all the committee men: the plaintiffs would be liable to be sued on this promise, subject to a plea in abatement. The plea liquidates the damage; it alleges that the defendant will be damnified and the money be lost. The testator was bound to indemnify the defendant in the first instance; and the plea therefore is good, on the principle of preventing circuity of action; *Carr v. Stephens*, 9 B. & C. 758, and other cases collected in the notes to *Turner v. Davies*, 2 Wms. Saund. 150. *Morley v. Inglis*, 4 New Ca. 58, is inapplicable: there the plaintiff was liable only as surety, and the damages recoverable from him were unliquidated. As to the last count, the plea shows that it arises from the *776] contract of the testator. He could not sue; and therefore his *executors cannot. In *Schofield v. Corbett* the defendant confessed receiving the money to the use of the administratrix, that is, after the death of the intestate. If the two counts here be not referred to the original right of the testator, there is a misjoinder: the declaration may be supported on the ground that they can be so referred: but then the second plea is an answer. No special ground of objection in respect of duplicity is pointed out.

The third plea is maintainable on the same ground. Unless the second count is founded on a supposed right which the testator, if alive, could enforce, there is a misjoinder: but, if it be so founded, the third plea, which shows that the testator could not himself have enforced the supposed right, furnishes an answer.

Crowder, in reply. The rule as to circuity of action is much qualified in the case where the plaintiff sues as executor. That explains the de

(a) The case was cited, in the argument, from 6 Nev. & M. 527.

cision in the case of set-off; for the direct object of the statute of set-off was to avoid circuity of action. [COLERIDGE, J. Rather to avoid multiplicity of actions. In the present case the defendant could not sue the plaintiffs till this action was disposed off; but in a case which would support a set-off the two actions might go on at the same time.] The loss to the defendant is here uncertain.

As to the last plea, it ought to answer any case which the last count can comprehend, including the money paid by the plaintiffs. [ERLE, J. I can conceive no case besides that put by Mr. Peacock. Suppose the last to be the only count: then, as it might *include an express [*777 promise to pay the plaintiffs on a contract (as an account stated) with them only, the plea could be no answer. *Cur. adv. vult.*

COLERIDGE, J., now delivered the judgment of the Court.

The first set of counts of the declaration was for work done and money paid by, and on an account stated with, the testator Davey. The second set was for the same, by and with the plaintiffs as executors of Davey. The first of the pleas alleged that Davey, being the projector of a company for a railway, agreed, in consideration of defendant consenting to act on the provisional committee, to indemnify him from any professional or other charges on account of the said railway: that defendant did consent so to act: that the works, moneys, and accounts in the two sets of counts mentioned were in and about the surveying of the line of the said railway, and after the said agreement to indemnify: the defendant became liable to the said professional charges in respect of surveying the said railway, and the other charges on account of the said railway, and made the promises, only in his character of member of the provisional committee, and not otherwise: that the project was abandoned, and the said work and money became useless and of no value: that any sums recovered on account of the said work and moneys paid will be lost to the defendant, and the defendant will be damnified to that extent, contrary to the promise of Davey to indemnify.

This plea shows that the causes of action were *professional and other charges on account of the railway, comprised within the [*778 testator's agreement to indemnify, and that the defendant could recover from Davey, or his representatives, as much as the plaintiffs can recover from the defendant in respect of these causes of action. The plea, therefore, is a bar, to avoid circuity of action; see *Turner v. Davies*, 2 Wms. Saund. 148 g, 6th ed., and note (2) ib., 2 Wms. Saund. 150, where cases are collected of pleas held good in avoidance of circuity of action.

The second of the pleas alleges that the testator caused the defendant to enter into the promises by fraud.

And, in support of the demurrer to this plea, it was contended that it could not apply to the promises in the second set of counts, which were made after the death of the testator. The defendant answered that, if he became indebted to the plaintiffs as executors for work done as exe

cutors after the death, and money paid as executors after the death, it was in the manner to be gathered from the first of the pleas, namely, that a contract was made with the testator for surveying the line, and that the plaintiffs, as executors, after the death, in performance of that contract, did the work and paid the moneys mentioned in the second set of counts, and that the account was stated with the plaintiffs in respect thereof: that the counts are applicable to this cause of action, and the defendant has a right so to apply them: and that, if the testator by fraud procured the original contract, his fraud procured the implied promise arising from performance of the work and payment of the money by the executors under the contract.

*779] *Upon this review, we are of opinion that the defendant's answer is well founded; and therefore judgment is for the defendant. Judgment for defendant.(a)

(a) See *Ford v. Beech*, post, 852, 862, 3.

(The following is the case cited in the argument, pp. 774, 776, ante.)

SCHOFIELD, and ELIZABETH his Wife, Administratrix of
LANE, v. CORBETT. [May 3, 1836.]

To assumpsit for money received to the use of plaintiff as administrator, and on an account stated with him as administrator, with promises to him as administrator, defendant cannot plead a set-off for money due from the intestate in his lifetime.

ASSUMPSIT. The declaration stated that defendant, on, &c., was indebted to Charles Schofield, and his wife as administratrix, in 80*l*. for money had and received to the use of C. S., and his wife as administratrix; and for money due to C. S., and his wife as administratrix, on an account stated between defendant and C. S., and his wife as administratrix: promise to C. S., and his wife as administratrix. Second plea. That the intestate in his lifetime was indebted to defendant in 100*l*. for work and labour performed on intestate's retainer, goods sold and delivered to him, money lent to him, money paid for him, money had and received by him, and on an account stated with him, which money, at the death of the intestate and at the commencement of the action, was still due to defendant; and the plaintiffs, "the plaintiff Elizabeth being, and as, administratrix," before and at the commencement of the suit, were still indebted to defendant in the said sum. Demurrer, assigning for cause that the plaintiffs by the declaration seek to recover money *780] due to C. S., and his *wife as administratrix, after the intestate's death, and on breaches of promises made to C. S., and his wife as administratrix, after the intestate's death; but that defendant

attempts to set off debts alleged to have been contracted by the intestate in his lifetime. Joinder.

Ball, in support of the demurrer, was stopped by the Court.

Sir *W. W. Follett*, for the defendant. If the defendant had in his hands, during the intestate's life and at his death, money belonging to him, that would, after the death, be money had and received to the use of the administratrix. The debts therefore may be in the same right. The words of the statute of set-off (2 G. 2, c. 22, s. 18) are "if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party."

Lord DENMAN, C. J. There are two cases which decide this point, referred to in Mr. Selwyn's *Nisi Prius*,^(a) and mentioned in Durnford's note to *Hutchinson v. Sturges*, Willes, 264.^(b)

LITLEDALE, PATERSON, and COLERIDGE, Js., concurred.

Judgment for plaintiff.

(a) *Assumpsit*, IV. 7, 2, Vol. I. p. 155. (11th ed.)

(b) Note (a), where *Tegetmeyer v. Lumley* and *Kilvington v. Stephenson* are given.

*RYALLS v. The QUEEN. Feb. 26.

[*781

(In Error.)

An indictment for perjury alleged, in two counts, that, after the passing of the Attorney's Act, 6 & 7 Vict. c. 73, an attorney, who had transacted certain law business for defendant, afterwards, *to wit*, on 7th August, 1844, delivered his bill of costs; that no application to have the bill taxed was made by the party chargeable within "one month" after delivery of the bill, nor was the bill referred for taxation within that period; that, after the expiration of "one month" from such delivery, *to wit*, on 25th April, 1845, the attorney obtained a Judge's summons requiring defendant to show cause why the bill should not be referred for taxation; that it became material in showing cause to ascertain whether defendant had retained the attorney; and that defendant falsely made affidavit in the matter of the summons, denying the retainer. Each count concluded, "and so the jurors aforesaid, upon their oath aforesaid, did say" that defendant had committed perjury.

The third and fourth counts were the same, except that they omitted to aver that no application to refer the bill had been made by the party chargeable.

The record then stated that, after joinder on a plea of Not guilty, a venire issued for a jury to try whether defendant "be guilty of the perjury and misdemeanor aforesaid," and that the jury found that he "is guilty of the perjury and misdemeanor aforesaid in manner and form as by the said indictment above against him is supposed:" and that a general judgment of imprisonment was pronounced on the indictment.

Held, on error to the Queen's Bench,

That, as all the counts referred to stat. 6 & 7 Vict. c. 73, the word "month," in the indictment, must be construed in the sense given to it by sect. 48, of "calendar month," and therefore the application, under sect. 37, to tax, did not appear to be premature.

That the third and fourth counts were good, because the Judge had jurisdiction, after the month, to issue the summons, though, if it had appeared, on showing cause, that a previous application within the month had been made by the party chargeable, the Judge might not have had jurisdiction to order taxation.

That the question of retainer appeared by the indictment to be material.

That, perjury having been well assigned in the part of each count preceding the words "and so the jurors did say," &c., those words might be rejected.

That "misdemeanor" was *nomen collectivum*, and therefore there was no uncertainty in the *verdict* or *verdict*.

On error to the Exchequer Chamber: Judgment affirmed: Held by that Court:

That "month" in the indictment was to be construed in its ordinary sense of lunar month, but that, as the alleged dates were material, the *videlicet*s were to be rejected, and the dates taken to be true, and, so, it sufficiently appeared that a calendar month had elapsed before the application to tax. And

Semble, also, that it was not necessary to allege that the calendar month had elapsed, as the Judge had general jurisdiction over the subject-matter, and his jurisdiction in the particular case was to be presumed.

ERROR from the special session of gaol delivery and oyer and terminer holden in and for the county of York, on Saturday, 6th December, 9 Vict.

*782] The record set forth an indictment against the plaintiff in error, the material parts of which were as follows.

First count: That one William Unwin, gentleman, after the passing of a certain act, &c. (6 & 7 Vict. c. 78), "for consolidating and amending several of the laws relating to attorneys," &c., and before and at the time of the committing the offence after mentioned, was an attorney practising in England, and was duly admitted, &c., and practising in Her Majesty's Court of Exchequer, &c., and had done and transacted business as such attorney, in her said Court, for and on behalf of Joseph Naylor Ryalls, late of, &c., farmer, and of James Ironsides, and on the retainer and at the request of the said J. N. Ryalls; and the said J. N. Ryalls and the said J. Ironsides then and there became and were indebted in a large sum of money to the said W. Unwin for fees, charges, and disbursements for the business so done, &c., for the said J. N. R. and the said J. I. by the said W. Unwin as aforesaid; and the said W. Unwin afterwards, and before the committing of the said offence after mentioned, to wit, on the 7th August, A. D. 1844, at, &c., so being such attorney as aforesaid, did deliver to the said J. N. R. and the said J. I., they the said J. N. R. and J. I. then and there being the parties to be charged therewith, a bill for the fees, charges, &c., for the said business so done, &c., by the said W. U. as such attorney as aforesaid; which said bill was then and there subscribed, &c.: and that no application was made to the said Court of Exchequer, so being the Court in which the said business was so done, &c., as aforesaid, or to any Judge thereof, or to any Court or Judge whatever, by the said J. N. R. and J. I., so being the parties

*783] chargeable, &c., or either of them, within one *month after the said delivery of the said bill; nor did the said Court of Exchequer, or any Judge thereof, or any other Court or Judge, *within one month next after* the said delivery, &c., refer the said bill, and the demand of the said W. Unwin as such attorney as aforesaid thereupon, to be taxed by the proper or any officer of the said Court of Exchequer or of any other Court. That afterwards, and after the expiration of *one month* after the delivery of the said bill as aforesaid, and before the committing, &c., to wit, on 25th April, A. D. 1845, at, &c., the said W. U., so being such attorney as aforesaid (the said bill then and there remaining due, &c., to him the said W. U.), did make application to Sir R. M. ROLFE, Knight, then and there being one of the Judges of the said Court of

Exchequer in which the said business was so done, &c., in the matter of aim the said W. Unwin, to refer the said bill so delivered as aforesaid, and the demand of him the said W. U. thereupon, to be taxed and settled by the proper officer of the said Court of Exchequer. And thereupon afterwards, to wit, on the said 25th of April, A. D. 1845, at, &c., the said Sir R. M. R., so being such Judge, &c., issued a summons in the said matter of the said W. Unwin, requiring the said J. Ironsides and J. N. Ryalls, or their attorney or agent, to attend the said Sir R. M. ROLFE at his chambers in, &c., on, &c., to show cause why (amongst other things) the said W. Unwin's bill of costs in the causes and matters delivered, &c., should not be referred to the Master of the said Court of Exchequer to be taxed; the said bill of costs in the said summons mentioned then and there being the said bill for the fees, &c., for the said business so done, &c., by the said W. Unwin as such attorney as aforesaid, *and so delivered, &c., as aforesaid. That the said J. N. Ryalls, afterwards, and before the time appointed for showing [*784 cause, and before showing cause, against the said application and the said matters mentioned in the said summons, to wit, on 2d May, A. D. 1845, at, &c., come before Henry Waterfall, gentleman, then and there being a commissioner duly authorized to take affidavits concerning matters depending, &c.: and it then and there became and was material, in showing cause why the said bill of costs in the said summons mentioned should not be referred to the said Master to be taxed, &c., to ascertain whether the said J. N. Ryalls did employ or retain, or otherwise authorize the said W. Unwin to act as attorney for him the said J. N. R. and the said J. Ironsides, or for either of them, in and about the business mentioned in the said bill, &c., of the said W. Unwin, &c., or in or about any part of such business; and whether the said J. N. R. had ever retained the said W. Unwin to act as attorney or agent for him the said J. N. R.: and the said J. N. R., so having come and being before the said H. Waterfall, &c., so being, &c., then and there produced a certain affidavit in writing of him the said J. N. R. in the said matter, &c., and then and there, before the said H. W., gentleman, in due form of law, was sworn, &c., concerning the truth of the matters contained in the said affidavit (H. W. having authority, &c.); and that the said J. N. Ryalls, not having the fear, &c., upon his oath aforesaid, before the said H. W., &c., falsely, corruptly, &c., in and by his said affidavit in writing in the said matter, &c., did depose and swear, &c., in substance, &c., that is to say: The count then set out, with innuendoes, the matter deposed to, which was: That *the said J. N. Ryalls did not retain or employ W. Unwin to act as attorney for him and J. Ironsides, or for either of them, in [*785 and about the business mentioned in the said W. Unwin's bill of costs, delivered, &c., or in or about any part of such business: and that he, the said J. N. R., never retained or employed the said W. Unwin to act as attorney or agent for him the said J. N. Ryalls in any cause or man-

ner whatever: As in and by, &c. (reference to the affidavit); Whereas, in truth and in fact, the said J. N. Ryalls did, to wit, on, &c., at, &c., retain and employ, and authorize the said W. Unwin to act as attorney for him the said J. N. R. and the said J. I., in and about the business mentioned in the said W. Unwin's bill of costs so delivered, &c., as aforesaid, and in and about every part of such business: and whereas, in truth, &c., the said J. N. Ryalls had (to wit, on, &c., at, &c.) retained and employed the said W. Unwin to act as attorney and agent for him, the said J. N. R., in the said business in the said Court of Exchequer as aforesaid: And so the jurors aforesaid, upon their oath aforesaid "*did say*" that the said J. N. Ryalls, on the said 2d May, 1845, at, &c., before the said H. Waterfall, &c., H. W. then and there having such lawful and competent power, &c., by his own act, &c., falsely, &c., did commit wilful and corrupt perjury, to the great displeasure, &c., against the form of the statute, &c., and against the peace, &c.

The 2d count stated: That it became material to ascertain whether the said Joseph N. Ryalls and the said James Ironsides, or either of them, did employ, &c.: and the matter sworn to was assigned as follows: "That he, the said J. N. Ryalls," &c., "*did not retain or employ*" *786] (meaning that he the said J. N. R. did not alone, *or jointly with the said James Ironsides, retain or employ) W. Unwin to act as attorney for him and James Ironsides, &c.; and the count averred a joint retainer by Ryalls and Ironsides.

The 3d count was the same as the first, only omitting to state that no application had been made to the Court of Exchequer by Ryalls or Ironsides.

The 4th count was like the second, with the same omission.

Plea: that J. N. R. is Not guilty of the premises in the said indictment specified, &c.

"Therefore let a jury thereupon here immediately come," &c., of free and lawful men, &c., "to recognise upon their oath whether the said J. N. Ryalls be Guilty of the perjury and misdemeanor aforesaid, or Not guilty."

Verdict: that the said J. N. Ryalls "is Guilty of the perjury and misdemeanor aforesaid, in manner and form as by the said indictment above against him is supposed." "Whereupon, all and singular the premises being seen," &c., "it is considered by the Court here that the said J. N. Ryalls be committed to the House of correction at Wakefield, in and for the said county, and there imprisoned and kept to hard labour for ten calendar months."

Numerous errors were assigned. The points insisted upon will appear sufficiently by the ensuing report. The writ of error was argued in Hilary term, 1847.(a)

Pashley, for the plaintiff in error. 1. All the counts contain the same erroneous averment as to time: viz. that, "after the expiration of

(a) January 23d. Before Lord DENMAN, C. J., PATTERSON, CROMBIE, and WIGHTMAN, Jts.

one month after the *delivery of" (Unwin's) "bill as aforesaid," the said Unwin made application to a Judge of the Court of Exchequer. *Primâ facie*, the word "month" in a statute, or in a deed, means a lunar month; *Com. Dig. Ann. (B.)*; (a) though not necessarily in mercantile contracts. In the statute 6 & 7 Vict. c. 78, on which the jurisdiction to tax depends, the words used are "one month" after the delivery of the bill; sect. 87. But by the interpretation clause (sect. 48) the word "month" in the statute is to be taken to mean a calendar month. The jurisdiction to tax does not therefore arise until a calendar month has expired: and, if so, the month must be expressly termed a "calendar" month in the count: for the interpretation clause does not extend to give a particular meaning to the word "month" in the pleadings. In criminal pleading, where the jurisdiction of another Court is material, it is necessary to state precisely all the facts essential to jurisdiction, including sentence; *The Case of The Marshalsea*, 10 Rep. 68 a, 76 b; *Rex v. Cohen*, 1 Stark, N. P. C. 511.

2. The third and fourth counts omit the statement, which is contained in the first and second, that "no application was made" to the Court of Exchequer by Ryalls and Ironsides, the parties chargeable by the bill, or either of them, within one month after the delivery of the bill: and that the Court did not within one month after the delivery of the bill refer it to be taxed. This is an essential averment, because, by sect. 37, the jurisdiction of the Courts to refer such a bill to taxation upon the application of the attorney depends on the fact that no such application has been made within *the month by the party chargeable. This jurisdiction, being a special statutory authority, must be so averred as distinctly to show that it had arisen. [WIGHTMAN, J. Suppose an "application" had been made by the party himself, and had failed, from the want, for instance, of a material affidavit: could not the attorney then have applied after the expiration of the month?] He could not: the Court would not allow the matter to be entered into a second time; *Regina v. Great Western Railway Company*, 5 Q. B. 597, *Joynes v. Collinson*, 13 M. & W. 558. But in any view the making of the first application is a condition precedent: and the necessity of stating it arises from the general rule of showing statutory authority strictly, as laid down in *Christie v. Unwin*, 11 A. & E. 878, *Brancker v. Molyneux*, 4 Man. & Gr. 226, *Regina v. Smith*, 7 Q. B. 548, *Rex v. Jones*, 4 B. & Ad. 345, *Rex v. Punahon*, 3 Campb. 96, *Regina v. Ewington*, Car. & Marsh 819.(b)

3. Perjury is assigned on the defendant's statement that he did not retain Unwin. But the question of retainer does not appear on the face of the indictment to be a material one; and therefore the materiality must be expressly averred; and the averment that it "then and there

(a) See *Simpson v. Margitson*, *antâ*, p. 22.

(b) S. C., on a case reserved for the Judges, 2 Moo. C. C. 222.

became and was material" is not sufficient: it should have been more particularly shown in what manner it became material; *Regina v. Hewins*, 9 C. & P. 786, *Regina v. Goodfellow*, Car. & Marsh. 569: it should have appeared how the affidavit was either used, or meant to be used, in *789] showing cause before the Judge. [COLERIDGE, J. The *statement, as here made, is at most only inartificial; and the jury have found the fact.]

4. The conclusion of the indictment, "the jurors aforesaid" "did say," instead of "do say," is erroneous; *Rex v. Perin*, 2 Saund. 398, *Rex v. Alway and Dixon*, 1 Ventris, 170; and cannot be rejected as surplusage. *Rex v. Bromley*, 1 Vent. 18, seems to show that the conclusion is a material part.

5. Either the entry of the verdict and judgment is uncertain, for not showing to which of the counts they refer, or, if they refer to the last antecedent, namely the fourth count, that count being bad for the reasons before shown under the second head of error, the judgment is bad; *O'Connell v. The Queen*, 11 Cl. & Fin. 155: or, lastly, if the words "perjury and misdemeanor" can be regarded as "nomina collectiva" (as to which the doctrine of *Rex v. Powell*, 2 B. & Ad. 75, is overruled by *O'Connell v. The Queen*, and again, virtually, by the decision of the Court of Queen's Bench in *Campbell v. The Queen*, post, p. 799, that "felony" is not nomen collectivum), then the finding is general on several counts, one of which is bad.

Bliss, contrà. As to the 3d and 4th counts, this point has been argued for the plaintiff in error as if the indictment were at common law. But a statement of the whole proceedings in which the perjury took place is rendered unnecessary by stat. 23 G. 2, c. 11. It is sufficient to show that this was a judicial proceeding before a Court having competent authority; *Rex v. Dowlin*, 5 T. R. 811. But, independently *790] of that statute, *enough appears to show that the Court of Exchequer had jurisdiction to tax the bill under stat. 6 & 7 Vict. c. 78: for, it being stated that this summons for taxation was after the month and on application by the attorney, it could not be suggested, against a superior court, that they had proceeded to tax without jurisdiction because it was not averred that the party chargeable had made no previous application. The cases cited do not bear out the proposition contended for, in the extent to which it is now advanced. In *Rex v. Smith*, 7 Q. B. 543, an application being made by overseers, it was not negatived that the parish had guardians, who would have been the proper parties to make the application, had they existed: but that was the case of an inferior jurisdiction, authorized to act only where there were no guardians. *Rex v. Jones*, 4 B. & Ad. 845, was not the case of an indictment for perjury. In *Rex v. Punshon*, 3 Camp. 96, the question arose on the evidence, not on the record: the same remark applies to *Regina v. Ewington*.

(On the point whether the question of retainer sufficiently appeared to be material, he was stopped by the Court.)

As to the venire and judgment. That the word misdemeanor is nomen collectivum was distinctly decided in *Rex v. Powell*, 2 B. & Ad. 75; and this is one of the cases in which the decision may be said to make the law: for, although many other cases may decide, as they do, that other words are not nomina collectiva, and although it may be difficult to assign any reason for the distinction, yet each decision must be regarded as separate, and one does not overrule another. The addition [*791 *of the word "perjury" makes no difference. "Perjury" is not, like "murder," a term of art; 4 Hawk. P. C. 26, B. 2, c. 25, s. 55, 7th ed.

If this be so, then, supposing the fourth count to be bad, the question arises whether the doctrine of *O'Connell v. The Queen*, 11 Cl. & Fin. 155, will be carried farther. But, supposing again that "perjury and misdemeanor" are not nomina collectiva, then the verdict and judgment are, at all events, not bad for uncertainty: the "aforesaid" will, in an indictment (if not in a civil action), refer to the last count; *Rex v. Richards*, 1 Moo. & Rob. 177, *Regina v. Rhodes*, 2 Ld. Raym. 886, *Sutton v. Fenn*, 3 Wils. 389, *Ross v. Morris*, Cro. Eliz. 486, *Childe v. Towers*, Cro. Eliz. 811. This is the ground on which the decision in *Campbell v. The Queen*, post, p. 799, really stands. For in that case the last count, to which the judgment necessarily referred, did not warrant the judgment; the verdict might have been given on the last count, and the jury not charged on the others.

As to the defect in the venire, it may be added that, since the statute, 6 G. 4, c. 50, regulating the return of jurors, the part now objected to is immaterial, and may be rejected as surplusage: it would have been sufficient if the venire had stopped at the words "let a jury" "immediately come," &c. The allegation of the offence which a jury were to come to try was simply for the information of the sheriff, as to what persons he should summon, "by whom," &c., which, since the alteration by sects. 13 and 20 of the act, is superfluous.

Lastly, the conclusion, "the jurors" "did say," may be rejected as surplusage, or at all events should be *construed so as to aid and not to defeat that which precedes; *Weathrell v. Howard*, 3 Bing. [*792 135, *Wyat v. Aland*, 1 Salk. 824, *Rex v. Stevens and Agnew*, 5 East, 244, 255.

Pashley, in reply. In *Regina v. Overton*, 4 Q. B. 88, the effect of stat. 23 G. 2, c. 11, in dispensing with certain allegations, was much considered: and it was held not to dispense with the necessity of averring so much as distinctly showed that the perjury arose in a judicial proceeding: that is, the proceeding of a Court of competent authority: which authority is not shown here in the 8d and 4th counts, for want of negating the application by the party chargeable. The objection

to a judgment entered generally, without specifying whether it be on all the counts or on which, is, that the punishment on each offence might be different: and further that, if the defendant receives a pardon for either of the offences charged, he ought to be enabled to plead it. The doctrine which makes words of reference generally stated relate to the last antecedent has been much qualified in late cases, and is departed from, where by insisting on it an incongruity would be produced; *Brancker v. Molyneux*, 1 Man. & G. 710.(a)

Although the decision in *Rex v. Powell*, 2 B. & Ad. 75, may not have been directly overruled, it seems quite inconsistent with the language of TINDAL, C. J., in *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 257, where he says: "it might perhaps have been difficult to sustain the statement, by reason of the word offence being *nomen collectivum*."

Cur. adv. vult.

*Lord DENMAN, C. J., now delivered the judgment of the
*793] Court. After stating the material parts of the record, his Lordship proceeded.

The first ground of error applies to each of the counts. They all allege that Unwin took out a summons to refer his own bill for taxation after the expiration of *one month* from the delivery. It is contended that this expression means one *lunar* month, whereas the act of parliament, 6 & 7 Viet. c. 73, which authorizes the reference, enacts, by the interpretation clause, sect. 48, that the word "month" shall mean "*calendar month*." We are of opinion that, as the counts of the indictment all refer to the act, the word "month" in the indictment must be construed according to the clause in the act, and that this ground of error cannot prevail.

The second ground of error applies only to the third and fourth counts, in which there is no averment, as there is in the other counts, that no application to tax had been made within the month by the party chargeable, in which case only the act authorizes an application to be made by the attorney himself; and so no jurisdiction is shown upon the face of the counts for issuing the summons. We are of opinion that this ground of error cannot be sustained. The Judge had jurisdiction, after the expiration of the month which is alleged in the count, to issue a summons at the instance of the attorney, calling on the party chargeable to show cause why the bill should not be taxed, although it may be true that, if it had appeared on showing cause that a previous application within the month had been made by the party chargeable, the Judge might not have had jurisdiction to make an order for taxation. Therefore

*794] *the affidavit of the defendant, made after such summons, was made in the course of a judicial proceeding: and this makes it unnecessary to consider what would have been the effect of the decision

(a) See *Rex v. Wright*, 1 A. & E. 434, 445.

in the case of *O'Connell v. The Queen*, 11 Cl. & Fin. 155, if one of the counts of this indictment had been had.

The third ground of error was that the materiality of the affidavit did not appear. This was disposed of on the argument. It is obvious that the fact of Unwin's being retained was a material ingredient in the inquiry.

The fourth-ground of error was that each of the counts concludes with the words "and so the jurors aforesaid, upon their oath aforesaid, *did* say that the said J. N. Ryalls," &c., did commit perjury; whereas it ought to have been "do say." The answer is, that the whole averment may be struck out. The perjury is sufficiently alleged by the preceding part of the count; and, as "perjury" is not a word of art like "murder," the concluding part of the count is immaterial.

The fifth ground of error was that the venire and the verdict are uncertain; that they are both in the singular number, speaking of the *perjury* and *misdemeanor* aforesaid; that this can mean only one perjury and misdemeanor; and that, as four are alleged in the indictment, it is uncertain which of them the jury was summoned to try, and of which of them the defendant was found guilty. Now it was decided in *Rex v. Powell*, that the word "misdemeanor" is nomen collectivum. That case was not overruled in *O'Connell v. The Queen*, as to this point. This Court, indeed, *in *Campbell v. The Queen*, post, p. 799, held [795] that the word "felony" is not nomen collectivum, and intimated some doubt as to the doctrine in *Rex v. Powell* respecting the word "misdemeanor;" but the Court of Exchequer Chamber in the same case, (a) agreeing with this Court as to the word "felony," and affirming the judgment, expressly say that *Rex v. Powell* has not been overruled, and treat it as a valid decision. We feel that it is so; and that we ought to act in conformity to it. The consequence is that the venire applies to all the counts of the indictment, and that the defendant has been found guilty by the verdict on all the counts. We have already expressed our opinion that they are all good; and no difficulty arises as to the judgment, which is for imprisonment only, and of course divisible.

We are, therefore, of opinion that the judgment must be affirmed.

Judgment affirmed. (b)

(a) Post, p. 814.

(b) Reported by H. Merivale, Esq.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

RYALLS v. The QUEEN. [Feb. 7, 1849.]

For marginal note, see *Ryalls v. The Queen*, ante, p. 781.

ERROR was brought in the Exchequer Chamber upon the judgment in the preceding case. The errors specially assigned were the same with those assigned on error in the Queen's Bench.

*796] **Pashley*, for the plaintiff in error. The objection to the concluding form of the counts is not insisted on. But the record should have shown affirmatively the fulfilment of the conditions on which alone the statutory jurisdiction can be exercised. This principle on which this depends is illustrated in *Rex v. The Chapel-wardens of Milnrow*, 5 M. & S. 248, and *Regina v. Smith*, 7 Q. B. 543. [CRESSWELL, J. An order to tax, at the instance of the attorney, cannot be made if the party chargeable has applied to tax within one month after delivery of the bill. But has not the Judge jurisdiction to issue his summons for referring the bill to taxation? The objection that the party chargeable has applied, or that the month has not expired, may be ground for showing cause. PARKE, B. Can you go into an inquiry of this kind with reference to a Judge of one of the Superior Courts who has general jurisdiction over the subject-matter? Trespass will not lie against a Judge for an act done by him judicially at chambers; *Taafe v. Downes*.(a)] Still, if he acts under a statute giving authority conditionally, the authority must appear on the face of his proceedings; *Muskett v. Drummond*, 10 B. & C. 153. [PARKE, B. It cannot be a condition precedent to the legality of the summons, that the Judge should ascertain whether there has been a previous application by the party chargeable; that may be ascertained afterwards. If the indictment had stated merely that the Judge had issued the summons, it would be enough. "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior

*797] **court*, but that which specially appears to be so;" *Peacock v. Bell*, 1 Saund. 74, relied upon by the Court in *Gosset v. Howard*, 10 Q. B. 411, 453. A Judge has general jurisdiction, by statute, as to taxation of costs; and it may be a question whether he has it not also independently of statute.] In an indictment for perjury, it must be shown, notwithstanding stat. 23 G. 2, c. 11, that the false oath was taken in a judicial proceeding; *Regina v. Overton*, 4 Q. B. 88. Such an indictment cannot be maintained on evidence given before Commissioners of bankruptcy, unless the fiat is supported by a good petitioning creditor's debt; *Ewington's Case*, 2 Moo. C. C. 223,(b) *Rex v.*

(a) Note to *Calder v. Halket*, 3 Moore, Pr. C. C. 36.

(b) S. C., at the assizes, Car. & Marsh. 319.

Punshon, 3 Campb. 96: and *Rex v. Jones*, 4 B. & Ad. 845, though not relating to perjury, is an analogous case. The word "month" in this indictment must be used in its ordinary sense of lunar month, and not in its exceptional sense as decided by the Queen's Bench. [PARKE, B. We agree that "month" per se must be taken to mean lunar month; but the dates given in the indictment are that the bill was delivered in August, and that the application to tax was not made until the April following. It is true that those dates are laid under a videlicet; but they are material; and therefore the videlicet may be rejected; and then they must be taken to be true. We decided such a point lately in *Whitaker v. Harrold*, 11 Q. B. 163.(a) In this view it satisfactorily appears that a full calendar month had elapsed before the application to tax. But I wish not to be understood as intimating that the indictment would not be good if the prefatory averments had been *left out; for the summons of a Judge of a superior court and of a justice [*798 of peace are not to be put on the same footing.(b)]

As to the venire and judgment. Neither the word "perjury," nor the word "misdemeanor," is nomen collectivum. The authority of *Rex v. Powell*, 2 B. & Ad. 75, seems to be much shaken by *O'Connell v. The Queen*, 11 Cl. & F. 155. In *Rex v. Salomons*, 1 T. R. 249, the word "offence" was not taken to be nomen collectivum. [PARKE, B. *Rex v. Powell* is not touched by *O'Connell v. The Queen*. "Misdemeanor" is the misconduct aforesaid.]

Bliss, contra, was stopped by the Court.

PARKE, B. We think the indictment is good, for the reasons already given. Although the word "month," in our opinion, would, if unexplained, signify lunar month, enough is stated to show the Judge's jurisdiction; for, as the dates are material, they may be taken without the videlicet, and taken to be true. But I do not think the indictment would be bad, even if it contained nothing to show that a calendar month had elapsed before the summons issued; for the Judge had general jurisdiction, and must be taken to have had jurisdiction in the particular case unless the contrary appear. I think in such a case the jurisdiction would be intended: but it is not necessary to decide the point. With regard to the last objection, *Rex v. Powell* was not overruled in *O'Connell v. The Queen*, nor by this Court in *Campbell v. The Queen*, post, p. 814; in which last case we affirmed the judgment of the Queen's Bench after a careful examination of old precedents.

*COLTMAN and WILLIAMS, Js. and ROLFE, B., concurred.(c) Judgment affirmed.(d) [*799

(a) In Exch. Ch., affirming the judgment of Q. B. in *Harrold v. Whitaker*, 11 Q. B. 147.

(b) See *Gosset v. Howard*, 10 Q. B. 411.

(c) CRESSWELL, J., left the Court just before judgment was delivered.

(d) Reported by H. Davison, Esq.

The following case was postponed in order that it might accompany
Ryalls v. The Queen.

CAMPBELL and Another v. The QUEEN. [Feb. 14, 1846.]

(In Error.)

Indictment, at Quarter sessions, charged prisoners in the 1st count with stealing in the dwelling-house of A. the moneys and goods of A. above the value of 5*l*.: in the 3d count, with simple larceny of moneys and goods (not other moneys, &c.) of the said A., describing them precisely as in the 1st count, and not using the word "afterwards." Plea: Not guilty of the premises. Jury process to try whether the prisoners are guilty of the felony aforesaid. Verdict: that the prisoners are guilty of the felony aforesaid, as by the indictment aforesaid supposed. Judgment, that the prisoners respectively be transported for ten years.

Held, on error in Q. B. that an indictment for felony containing several counts is bad in arrest of judgment, and on error, for duplicity, if it necessarily appear that two or more of the counts are for the same offence: but that this did not necessarily appear on the present indictment.

That the word "felony" was not *nomen collectivum*, meaning felony generally, but pointed to one particular charge of felony.

That the verdict was bad for uncertainty in not specifying the offence of which it found the prisoners guilty. And

That the judgment was erroneous, the Court not being at liberty to apply it to the first count only.

Verdict and judgment set aside: and adjudged that the Sessions should award a *venire de novo*.

On error in the Exchequer Chamber:

Held that, whether or not the word "felony" was to be taken as *nomen collectivum* in the judgment at Sessions, it could mean in the jury process one offence only; and therefore the process was here misawarded, and the judgment could not be sustained.

The Court of Quarter Sessions, whether held before a recorder or ordinary justices, is not an inferior court within the meaning of the rule which prevents issuing a *venire de novo* to inferior courts; and it is, in each case, a continuing court from session to session.

Therefore, when such court gives judgment against defendant on a verdict upon jury process which has been misawarded, a court of error may order it to award a *venire de novo*.

Quere, whether, on a defective verdict in felony, a *venire de novo* may be awarded. But, if it may, this may be done by a court of error after judgment given in the court below on such verdict.

Judgment of Queen's Bench affirmed.

ERROR from the general Quarter sessions for the borough and city of Chester and county of the same city, held before the Recorder, July, 1845. The record set forth the following indictment.

*800] 1st Count. "That Robert Campbell, otherwise Robert Fisher, late of," &c.(a), "and John Haynes, late of," &c., "on the 9th day of May, in the eighth year," &c., "at," &c., "one bag, of the value," &c., "one purse, of the value," &c., "twenty-eight pieces of the current gold coin of the realm called sovereigns, of the value of 20*s*. each, twenty pieces," &c. (describing other moneys, and bank notes), "of the moneys, goods, and chattels of one Robert Drury, in the dwelling-house of the said Robert Drury, there situate, then and there being found, then and there in the said dwelling-house feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace," &c.

(a) The addition was misplaced, as here stated.

2d Count. That the said Robert Campbell, otherwise, &c., and the said John Haynes, on, &c., at, &c., "one bag, of the value," &c., "one purse, of the value," &c., "twenty-eight pieces," &c. (describing the same moneys and notes, and in the same words, as in the first count), "of the moneys, goods and chattels, of the said Robert Drury, then and there being found, feloniously did steal, take, and carry away, against the form of the statute in such case," &c., "and against the peace," &c.

The record then set forth the plea, and subsequent proceedings, as follows.

"And now here," &c., "comes the said Robert Campbell, otherwise R. F., and John Haynes," &c., "and forthwith being demanded concerning the premises in the said indictment above specified and charged upon them how they will severally acquit themselves thereof, they the said Robert Campbell, otherwise R. F., and John Haynes, severally say that they are Not *guilty thereof; and therefore for good and [801 evil they put themselves upon the country. And John Walker, clerk of the peace and clerk of the crown for the said borough and city, who prosecutes for the said Lady the Queen in this behalf, doth the like. Therefore let a jury thereupon here immediately come before the said Recorder," &c., "of free," &c., "by whom the truth of the matter may be better known, and who are not of kin," &c., "to recognise upon their oath whether the said Robert Campbell, otherwise R. F., and John Haynes, or either of them, is or are guilty of the felony in the indictment aforesaid above specified or not guilty: because as well," &c., "as," &c., "have severally put themselves upon the said jury. And the jurors," &c., "for this purpose impannelled and returned, to wit" (naming them), "being called, come, who, being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath say that the said Robert Campbell, otherwise R. F., and John Haynes, are Guilty of the felony aforesaid on them above charged in the form aforesaid, as by the indictment aforesaid is above supposed against them. And (a) there upon this it is forthwith demanded, if they the said Robert Campbell, otherwise R. F., and John Haynes, or either of them, have or know anything to say wherefore the said Recorder and justice ought not, upon the premises and verdict aforesaid, to proceed to judgment against them; who nothing further say, unless as they before have said, and by the said Recorder and justice *fully understood: It is considered and [802 adjudged by the Court here that the said Robert Campbell, otherwise R. F., and John Haynes, respectively, be transported beyond the seas to such place as her Majesty by and with the advice of her Privy Council shall direct and appoint, for the term of ten years."

It was assigned as error "that the said judgment is invalid and void

(a) On the ensuing argument in the Exchequer Chamber, *Waddington* stated that a line had been omitted in this sentence. It was observed there that the judgment did not purport to be passed "for the offences," or "offence, aforesaid:" but he contended that this was not necessary.

in law:" and the following grounds were specially stated. "That in the record of the said judgment the said R. Campbell, otherwise R. F., and J. Haynes are charged with two separate and distinct felonies and are convicted of one felony, and that it is uncertain of which of the said felonies the said R. Campbell, otherwise R. F., and J. Haynes are convicted." "That the judgment of transportation for the term of ten years is not warranted by the finding of the jury, as appears by the record of the said judgment." "That it is consistent with the tenor of the record of the said judgment that the said R. C.," &c., "and J. H. were only guilty of the felony mentioned in the second count of the indictment therein contained, and therefore that the said judgment of transportation for ten years is altogether void and illegal." "That it does not appear by the record of the said judgment of what felony the said R. C.," &c., "and J. H. are convicted, or whether the sentence therein awarded is warranted by law." And "That it does not appear by the said record that the said Robert C.," &c., "and J. H. are convicted of a felony warranting the judgment therein recorded." Prayer of reversal, and that defendants and each of them may be discharged from the judgment, and restored to the common law of this realm, and to all things, &c.

Joinder in error.

*803] *The case was argued in Hilary term (January 17), 1846.(a) *Peacock*, for the plaintiffs in error. The first question is whether, inasmuch as a judgment of ten years' transportation is right if applied solely to the first count, but wrong if applied solely to the second, a verdict which does not distinguish between the two counts can be correct, not showing which the offence is of which the jury convict. It may, indeed, be contended that the verdict finds the prisoners guilty of the whole matter charged. [Lord DENMAN, C. J., referred to *Rex v. Powell*, 2 B. & Ad. 75.] In that case, which turned on the word "misdemeanor" being nomen collectivum, the first count charged an assault with intent to ravish, the second a common assault: verdict, Guilty of the misdemeanor and offence in the said indictment specified: judgment, that the prisoner for the said misdemeanor be imprisoned for two years and kept to hard labour; and it was contended, on writ of error in the Queen's Bench, that the judgment was bad, the punishment of hard labour being inapplicable to the offence charged in the second count: but this court held that, whatever might be the meaning of the word "offence," the word "misdemeanor" is nomen collectivum; and the judgment was affirmed. Lord TENTERDEN, however, agreed that, if the words "misdemeanor and offence" must be understood as relating to one only of the matters charged, the judgment could not be supported. [Lord DENMAN, C. J. TAUNTON, J., pointed out the distinction, that the indictment *804] in that case did not purport to *charge two distinct offences. In this indictment also the second count does not contain the words

(a) Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, Js.

"afterwards" or "other.""] In *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 295, PARKE, B., says, with reference to that distinction, and the modern practice of introducing many counts into one indictment, that, "though we know practically that these are most frequently descriptions, only in different words, of the same offence, they are allowable only on the presumption, that they are different offences, and every count so imports on the face of the record, as Mr. Justice BULLER states in *Rex v. Young*;(a) though the late Mr. Justice TAUNTON intimated a different opinion, I think without sufficient ground, in *Rex v. Powell*, 2 B. & Ad. 78." [Lord DENMAN, C. J. If there are two separate indictments against the same man, there is no presumption that they are for different offences.] There is an instance in Coke's Entries, pp. 352 *b*, 353 *a*, in which the prisoner puts in one plea of Not guilty to two indictments for different felonies, found on different days in the same term, and the jury find him guilty of the several felonies: but, had they found him guilty of the felony aforesaid, to which would the verdict have been referred? That was a course which is never adopted in modern times; but it is still usual to arraign and try a prisoner on an indictment for homicide, and the coroner's inquisition charging him with the same offence, at the same time. [COLERIDGE, J. The pleas are taken separately, and the jury is charged separately: both are tried at once; after which the verdict is entered separately.] If the inquisition charged him with murder, and the indictment charged him with manslaughter, it *would be uncertain whether a verdict of Not guilty applied to the minor or to the aggravated offence, which might embarrass the prisoner afterwards in pleading autrefois acquit. In *Culliford's Case*, 6 Mod. 219, a proceeding there under discussion was compared by the Court "to the case where two indictments are against a person for one fact, as one by the coroner's inquest, and the other by the grand jury, and he is arraigned, tried, and acquitted upon one of them, yet he is not thereby discharged, but shall be arraigned *de novo* upon the other, to which he may plead the former acquittal on the other. But now the course is in the Old Bailey, and is indeed the most easy and fair, to try him upon both the indictments at once." [COLERIDGE, J. The difficulty suggested could not arise in such a case; for there are two separate records.] The argument is at present proceeding on the assumption that there has been but one offence though it is charged in the indictment as two; there is nothing to show the Court which is the one; nor, if the verdict is to be applied to both counts, is there anything to prevent a judgment for seven years from being good equally with that for ten; for it would be supported by the second count. It does not appear, however, whether two offences are charged, or only one: even if "felony" be nomen collectivum, the finding does not show that; and therefore does not show whether the judgment is or is not open to the objection which succeeded.

(a) *Young v. The King*, 3 T. R. 98, 106

in *Whitehead v. The Queen*, 7 Q. B. 582; for, if there were two offences, and any part of the sentence is to be applied to the second count, the judgment on the first count is wrong. It may be said that, if there was *806] in fact but one offence, the second count is surplusage: *but suppose judgment had been given on that count for some additional punishment, and that had been objected to as erroneous, then it would have been said that the word "felony" is nomen collectivum, and that, the prosecutor not having been put to his election, the judgment for separate punishments on each count was right. So that, if the word "felony" is not nomen collectivum, the verdict is uncertain; if it is nomen collectivum, the record is still uncertain in not showing whether the judgment is or is not according to law; for the only supposition on which the judgment can be supported is, that there was only one offence; and that is not shown.

But *Rex v. Powell*, 2 B. & Ad. 75, is virtually overruled by *O'Connell v. The Queen*, 11 Cl. & Fin. 155. In giving their opinion in that case, PATTESON, J. (p. 264), WILLIAMS, J. (p. 276), ALDERSON, B. (p. 290), Lord LYNTHURST, C. (p. 315), and Lord BROUGHAM (p. 342), supporting the judgment below, relied on *Rex v. Powell*. Lord DENMAN, C. J. (p. 378), taking the contrary view, refers to the distinction suggested by TAUNTON, J.; Lord CAMPBELL, also (p. 417), seems to treat the case as not being applicable to the question then under consideration.

Waddington, *contra*. The rule as to the province of a court of error is correctly laid down by ALDERSON, B., in *O'Connell v. The Queen*: "a court of error cannot reverse a judgment upon a mere conjecture that it may be wrong, but must see clearly that the judgment below is erroneous:" here the argument for the *plaintiffs in error rests on a *807] conjecture of bare possibilities: that argument must fail unless it be shown that the doctrine established in *O'Connell v. The Queen* applies to felony. TINDAL, C. J., there (p. 240), after stating the practice as to several counts in an indictment for felony, and putting the case of a general verdict of Guilty on such an indictment, and judgment thereon of a discretionary punishment, after which it is discovered that one of the counts is defective for want of a material averment, proceeds: "it would surely be against all principle both of law and reason (for as to any decision in support of such a doctrine, none can be found) that the judgment should be reversed, and the party who had been convicted on the indictment discharged from all punishment for his offence." This is the doctrine which the House of Lords decided not to be law as regards misdemeanor: but in misdemeanor it is the constant practice to charge different offences in the same indictment; and the decision in *O'Connell v. The Queen* proceeded on the ground that some part of the punishment must be taken to have been awarded for offences that were ill charged: but, as in felony there is never more than one substantive crime charged in the same indictment (a rule of practice which the Court will take

notice of), that decision does not apply to the present case. Then it is said, again relying on *O'Connell v. The Queen*, that, as some part of the ten years' transportation must be referred to the second count, the judgment is wrong as to both. Now there is nothing to show that any part of the sentence is applicable to the second count; it is an entire punishment, and the correct punishment on the first count: but, on the supposition *of there being two offences, it would be quite wrong on the second count: there is, therefore, no difficulty in applying the [808 punishment to the first. It is said that, admitting the word "felony" to be nomen collectivum, this record necessarily implies that there was more than one offence: but the verdict, on the contrary, is so drawn up as expressly to show that there was only one felony, but that felony with aggravation: there is no inconsistency in a general finding of Guilty. [PATTISON, J. What would be the effect of a general verdict of Guilty on an indictment for cutting and maiming, charged in one count to be with intent to murder, in another with intent to do grievous bodily harm? The punishments are different.] Such a case is alluded to by PARKE, B.,(a) when speaking of counts to which the divisibility of punishment could not be applied as the punishment in one count would exhaust the whole. But here the effect of the record is to find one felony only; in the words of Lord DENMAN, C. J.,(b) "including the offence with its aggravations, as stated in the first count, as well as the mere assault" (here larceny), "as stated in the second." The Court will not presume that two offences are charged: and, as regards the apportionment of the punishment, there seems to be no reason why the judgment should not be deemed to apply seven years of the transportation as a concurrent sentence on the second count. There is no authority for saying that every count must be such as will support the whole sentence. The entry in Co. Entr. 852 b, 858 c, indicates the existence in Queen Elizabeth's time of a practice which has been long exploded: were it otherwise, it would not support the *argument for the plaintiffs in error; for the judgment was capital. The judgment here does not rest upon the decision in *Rex* [809 *v. Powell*, which was wrong as regarded the hard labour if even a single day were taken for the second count; nevertheless, both counts being good, Lord CAMPBELL thought it right;(c) here transportation is the proper punishment on each count.(d)

Peaseack, in reply. The practice as to election is not imperative,(e)

(a) *O'Connell v. The Queen*, 11 Cl. & Fin. 397.

(c) *Ib.* 417.

(d) It was also argued for the plaintiffs in error: First, that there was nothing to connect the judgment given with the premises, the words "there upon this" not being equivalent to "there-upon" or "therefore" (see p. 801, note (a), antè). Knightley's Case (cited in *Rex v. Harris*, 1 Ld Raym. 482) was referred to. Secondly, that the demand whether the prisoners had anything to say was not stated to have been made "of them." On this point *Peaseack* cited *Anon. 3 Mod. 265*, *Rex v. Geary*, 1 Show. 131, 1 Chit. Crim. L. 720. Neither of these points being adverted to in the judgment, it is not thought necessary to give the argument on them more at large.

(e) See *Regina v. Hinley*, 2 Moo. & Rob. 524.

(b) *Ib.* p. 379.

and cannot supersede the general presumption of the law that each count imports a separate offence. A trial for two distinct felonies on the same record would not be erroneous; but the verdict must be so entered as to enable the Court to apply the proper judgment to each: no one would say that on an indictment for cutting and maiming, with several counts charging respectively an intent to murder, and other intents, a general verdict of Guilty would justify sentence of death. [WIGHTMAN, J. Those are different felonies: cutting and maiming is not a felony at all at common law; but when it is done with certain intents the statute has created several distinct felonies. But here the felony is the stealing, a *810] felony at common law; *what the statute adds is merely aggravation; it does not make two felonies.] In civil pleading, an aggravated trespass cannot be treated as two trespasses; but, if the plaintiff relies on the matter of aggravation as making the defendant a trespasser, he must now assign it. Where a declaration in trespass contained two counts, the first for breaking and entering the plaintiff's house and expelling him therefrom, the second for the expulsion only, and on a plea of Not guilty a general verdict of Guilty was entered, BULLER, J., held that, the expulsion being mere aggravation, and it being admitted that only one act of trespass was proved, the general verdict could not stand; *Taylor v. Cole*, 3 T. R. 292. The same reasoning would apply to a declaration containing two counts on a bill of exchange, or on a warranty.^(a) It follows that, if there was only one offence, this verdict is wrong; or, if it appear that there were two offences, the judgment is uncertain.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the substance of the record, his Lordship proceeded as follows.

It is objected, on error, that the indictment charges two felonies, that the verdict is confined to one felony, and it is uncertain to which. The first question, therefore, is, whether the indictment charges two felonies or only one felony. Now the rules of pleading in criminal and civil matters proceed generally on the same principles. In civil actions, no doubt, a declaration containing two counts which, necessarily, on the face *811] of them, are for the same cause of action, would be *bad for duplicity on special demurrer; *Slade v. Drake*, Hob. 295 (as to rules of pleading): therefore it has been usual to insert the word "other" in a second count in order to avoid a demurrer. The defect is indeed held to be cured by pleading over, in *Humphreys v. Bethily*, 2 Vent. 198, 222, though it appears to have been held otherwise in *Hart v. Langfitt*, 2 Ld. Raym. 841: and after verdict the Court will not arrest the judgment, though the word "other" be omitted, if the counts do not necessarily appear to be the same; and, without necessity, the Court will not intend them to be so; *West v. Troles*, 1 Salk. 213, a case which is cited in *Com. Dig. Pleader* (C. 83), in 6 Bac. Abr. 188 (7th ed.), tit. *Pleas and Plead-*

(a) See *Deere v. Ivey*, 4 Q. B. 379.

ings (B) 1, and in 7 Vin. Abr. 389, tit. *Declaration* (M) pl. 2: all which shows that one cause of action cannot properly be charged twice over in the same declaration. Neither, as we think, can one offence, whether felonious or not, be properly charged twice over, whether in one indictment or in two: and, as special demurrers are not necessary in criminal cases, we think that, if the two counts in an indictment necessarily appear to be for the same charge, the objection might be taken in arrest of judgment. But still the Court would, if possible, hold them not to be for the same offence; and certainly the omission of the word "other" would not of itself make them the same (see also *Rex v. Hayes*, 2 Ld. Raym. 1518); though the insertion of the word "other" would make them different. Now here it appears to us that they cannot be said to be necessarily for the same charge; for they may be pointed at *a stealing in a dwelling-house, and another stealing out of it: [*812 and therefore we think the indictment is good. But the very argument that they are for the same charge involves the consequence that the indictment is bad in arrest of judgment and on error. The verdict cannot be held good on the ground that only one felony is charged, without making the indictment itself bad.

It should be observed that this reasoning in no way affects cases where the same facts may in reality constitute several felonies; as for stabbing with intent to murder, and to do grievous bodily harm; forgery with intent to defraud A., and also to defraud B.; in which the intent is a necessary ingredient in the felony; and many other cases which might be put, in all which two or more counts would be proper, and might be all proved; but in all such cases the counts would on the face of them appear to be different.

Taking it, then, that the Court must treat this indictment as charging two felonies, the next question is what is the effect of the verdict and judgment.

Now the jury process is stated on the record to be to try whether the prisoners are guilty of the "felony" (in the singular number) in the indictment aforesaid charged; and the verdict is that they are guilty of the "felony" aforesaid. The jury process, therefore, as well as the verdict, is wrong unless the word "felony" is nomen collectivum; for the jury process can no more alter the meaning of the indictment than the verdict can. If the word be not nomen collectivum, then the prisoners are found guilty of one felony only, that is on one count only; and it is uncertain on which: the verdict therefore is imperfect. The judgment also is in that case erroneous; for it may be a judgment on *the last count, which will not warrant ten years' transportation: and we are not at liberty to treat the judgment as applying the [*813 verdict to the first count only, and as being a judgment on that count only. The doctrine of supposing the Court to apply its judgment only to that part of the record which will support such judgment was expressly

repudiated by the House of Lords in *O'Connell v. the Queen*. It is true that in that case there was a bad count, and here there is none : but there is a judgment not warranted by one of the counts ; and the same reasoning will apply. Indeed the verdict must surely be good or bad when delivered ; and, if bad for uncertainty at that time, it cannot be made good by the Court choosing to apply it as they may think fit.

But it is said that the word "felony" is to be taken as *nomen collectivum*. We cannot find any authority for this position except that of *Rex v. Powell*, 2 B. & Ad. 75, as to the word "misdemeanor." That case was certainly decided upon the assumption that misdemeanor is *nomen collectivum* ; for what TAUNTON, J., threw out as to there being but one charge was not mentioned in the argument of the case, nor adopted by the Court, nor made the ground of the decision even by TAUNTON, J., himself. It may be doubtful whether that case is rightly decided ; at all events we cannot extend it. We apprehend the words "the felony aforesaid" to mean the act charged to which the character of felony is ascribed, and not to mean that the prisoners are guilty of felony generally : the words seem necessarily to point to one particular charge. We hold, therefore, *that the word "felony" is not to be taken as
*814] *nomen collectivum*, that the verdict is imperfect, and the judgment must be set aside, and the verdict also, and a venire de novo awarded, as was held to be the course in *Rex v. Huggins*, 2 Ld. Raym. 1574.

Judgment : That the verdict and judgment upon the said indictment be, for the errors aforesaid, set aside and annulled : and that the said Recorder, &c., in and for, &c., do award a writ of venire facias juratores de novo upon the said indictment : and that the keeper of the general Penitentiary at Millbank, in whose custody the prisoners were present here in court, or his deputy, do deliver the said R. Campbell, otherwise, &c., and J. Haynes, into the custody of the constable and gaoler of the said borough and city of Chester, charged with the said indictment, to be by him severally kept in safe custody until they shall be from thence discharged by due course of law.(a)

(a) Reported by Robert Hall, Esq.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

CAMPBELL and Another v. The QUEEN. [Dec. 3, 1847.]

(For syllabus, see p. 799, antè.)

ERROR was brought in the Exchequer Chamber on the above judgment, the errors specially assigned being (substantially) that the judgment should have been merely to reverse and annul the judgment below: and that the judgment was erroneous in adjudging that the *verdict should be set aside and annulled; in adjudging that the Recorder should award a venire de novo; and in adjudging that the keeper of the Penitentiary should deliver the prisoners to the constable and gaoler of Chester, charged, &c., to be by him severally kept, &c., until, &c. And the plaintiffs in error did "pray the judgment of the Court upon the premises, and that judgment may be given therein according to law, and that the said," &c. (plaintiffs in error), "and each of them, be discharged and restored to all things which they have and each of them hath lost by occasion of the said judgment." Joinder in error. [*815]

The writ of error was argued in Michaelmas vacation, 1846,^(a) and Hilary vacation, 1847.^(b)

Peacock, for the plaintiffs in error. Assuming the decision of the Court of Queen's Bench against the sufficiency of the indictment to be well founded, there was no authority for their directing an award of venire de novo after verdict in a case of felony. *Rex v. Huggins*, 2 Ld. Raym. 1574, S. C. 2 Str. 882, was cited in the judgment below as a precedent for that course; but there was no decision there that such an award might be made. In *Arundel's Case*, 6 Rep. 14 a (on an indictment for murder), where the jury had been returned from a wrong vicinage, a venire de novo was awarded, but not by a court of error. In *Gray v. The Queen*, 11 Cl. & Fin. 427, where a peremptory challenge had been wrongly disallowed in felony, the Court of *error did so award; but there, [*816] in effect, there had been no trial. In *Rex v. Hayes*, 2 Ld. Raym. 1518, it was admitted by the Court that, on a defective finding by a jury, a venire de novo may issue; but nothing is said as to the power of a Court of error: and Co. Litt. 227 a, which appears to have been one of the authorities relied upon, does not touch this point. Nor does *Rex v. Fowler*, 4 B. & Ald. 278, decide anything upon it. [PARKE, B. One or other verdict there was deemed to be good, quâcunque viâ datâ. ALDERSON, B., mentioned *Channens's Case*, 1 Moo. C. C. 374, where a quaker served on the jury, not being sworn but affirming, and the pri-

(a) December 4th, before WILDE, C. J., MAULE and WILLIAMS, Js., and PARKER, ALDERSON, HOLYER, and PLATT, Bs. December 5th, before the same Judges and COLMAN, J.

b) February 2d. Before the same Judges as on December 4th.

soner was convicted of murder. PARKE, B. I know the Judges there considered that the proper course would have been a reversal on error, and a venire de novo. ALDERSON, B. The defendant was of course not willing to subject himself to another trial; and he died in prison before anything was done.] The principle to be relied on in such a case must be that the man's life never was in jeopardy. There is a difference between the case of a bad verdict and the case in which, after a good verdict, the Court below refuses to give the right judgment. One distinction is, that in the latter event the goods are forfeited on the judgment (if not reversed); in the former not. If, after conviction, the party died, his representative might bring error; the Court of error might then reverse the judgment; but they could not award a venire de novo.

The verdict, in the present instance, is one pronounced at quarter sessions: and, even in civil cases, a Court of error does not grant a venire de novo when the proceedings have originated in an inferior court; *817] *Trevor v. Wall, 1 T. R. 151, Bishop v. Kaye, 3 B. & Ald. 605, 610. [PARKE, B., referred to 2 Tidd. 928 and note b, ib. (9th ed.), and to Leach v. Thomas, 2 M. & W. 427, as to the power generally of a Court of error to grant a venire de novo. MAULE, J. An inferior court cannot grant a new trial; and for that reason, perhaps, it has been said that a venire de novo cannot go to them from a Court of error.] (The judgment on this point makes it unnecessary to give the argument in more detail.) There is not now any record in the inferior court, on which the case could be tried if sent back. No record is prepared there till a writ of error is brought; and then the proceedings are made up in form and sent to the Court of Queen's Bench: under stat. 11 G. 4 & 1 W. 4, c. 70, s. 8, a transcript only, and not the record, as formerly, comes from that Court to the Exchequer Chamber, but the record itself remains in the Queen's Bench, and is not sent back to the inferior court. If a venire de novo issued, it should go to the court which actually has the record, and the judgment should be given there.

Another difficulty arises on the suggestion that the Court of Queen's Bench could do more than reverse the judgment. That Court has held that it cannot pass the proper sentence where the original Court has omitted to do so, and cannot send the record back to the original Court for the right judgment to be pronounced there. It seems to follow that the Queen's Bench cannot remit the case to the original Court to be *818] tried. [PARKE, B., referred to stat. 6 H. 8, c. 6.(a)] That *re-
lates to cases where felons have themselves removed their bodies

(a) Stat. 6 H. 8, c. 6, "for the remitting prisoners with their indictments to the places where the crimes were committed," recites and enacts as follows. "Where divers felons and murderers, upon feigned and untrue surmises, have oftentimes removed, as well their bodies as their indictments, by writ and otherwise, before the King in his Bench, and cannot by the order of the law be remitted and sent down to the justices of gaol delivery, or of the peace, ne other justices ne commissioners, to proceed upon them after the course of the common law: Be it therefore ordained and enacted by the authority of this present parliament, That the justices of the King's Bench for the time being have full authority and power, by their discretions, to remand and send

and indictments by writ (probably habeas corpus or certiorari) into the Queen's Bench; that is not so here; nor can the removal be ascribed to "feigned and untrue surmises." The statute, if construed in the largest sense, would enable the Court of Queen's Bench to get rid of writs of error altogether in criminal cases. [WILDE, C. J. They would always have a duty to discharge as to the writ.] The enactment seems referable entirely to prosecutions in which no judgment has yet been pronounced. [PARKE, B. Certainly the Court of Queen's Bench have thought that they could not, as a court of error, give judgment where the punishment was discretionary,^(a) because they did not know the facts; and that, where the Court below had already given judgment, the case could not be remitted thither for the right judgment to be given. Whether or not they adverted to stat. 6 H. 8, c. 6, is not clear.] *Rex v. Ellis*, 5 B. & C. 395, *Rex v. Bourne*, 7 A. & E. 58, and *Rex v. Silversides*, 3 Q. B. 406, 412, are such cases. [WILDE, C. J. In those cases the verdict was not defective; judgment had been given by the Court below; and the record would have gone back to the same Court in order that a different judgment might be pronounced on the same facts.] If a court of error might award a venire de novo in a case like the present, the Court of error, in *O'Connell v. The Queen*, 11 Cl. & Fin. 155, might have awarded it as to part of the indictment. [ALDERSON, B. Could there be a partial venire de novo?] Different counts are like different indictments: the judgment on each is distinct. But, if the Court of error cannot send a case back to the Court below for the right judgment to be given, it seems clear that they cannot send it back for a new trial. In *Whitehead v. The Queen*, 7 Q. B. 582, where sentence of transportation had been passed for a shorter term than the law prescribed, neither course was pursued, or suggested. If a venire de novo could be awarded here, it may be asked where the prisoners could be tried? The sessions at which the conviction took place are not adjourned. The form of entering continuances, as used on poor law appeals, is not applicable to criminal proceedings. And, generally, "if no" "adjournment of the session be made (for it cannot be made of the matter itself only), no subsequent session has any power to make an order in the case:" Dickinson's Guide to Quarter Sessions, 61, c. 1, s. 5 * (5th ed.). [820] No statute authorizes trying at a second session to which there has not been any adjournment. [ALDERSON, B. What statute enables us to postpone a trial to the next Old Bailey sessions or next assizes?]

down, as well the bodies of all felons and murderers brought or removed, or that shall be removed or brought before the King in his Bench, as their indictments, into the counties where the same murders or felonies have been committed and done; and to command all justices of gaol delivery, justices of peace, and all other justices and commissioners, and every of them, to proceed and determine upon all the aforesaid bodies and indictments so removed, after the course of the common law, in such manner as the same justices of gaol delivery, justices of peace, and other commissioners, or any of them might or should have done, if the said prisoners or indictments had never been brought into the said King's Bench."

(a) *Rex v. Kenworthy*, 1 B. & C. 711, 718.

Another question is, whether a venire de novo be a process at all applicable to this case. The borough jury is summoned (under stat. 5 & 6 W. 4, c. 76, s. 121), not to determine the particular issue, as in a civil cause, but to try all the prisoners of the session. The order, therefore, if any, should be that the Court try again, but not that a venire de novo should issue. [PARKE, B. Generally, a court of oyer and terminer may award a venire de novo. Does the statute take away this power from the sessions?]

The jury being summoned, not to try certain specific issues, but, generally, the prisoners of the session, it is no valid objection on this record that the jury are stated to have been summoned "to recognise" whether the prisoners or either of them is or are guilty of "the felony" above specified. Independently of any form of summons, if they had been merely called into the box a moment before the trial, they were a good jury. [WILDE, C. J. They are sworn to speak the truth "of and concerning the premises;" that is, whether the prisoners be guilty of the "felony" before specified.] The question, then, reduces itself here to the point whether (assuming that different offences are charged in the two counts) "felony" be or be not nomen collectivum. "Misdemeanor" was held to be so in *Rex v. Powell*, 2 B. & Ad. 75; and that decision has never been overruled. [ALDERSON, B. If you succeed on this *821] point, you *re-establish the judgment of the quarter sessions, which clearly applies only to one offence.] This is not a writ of error on behalf of the Crown. [ALDERSON, B. Must not we give the right judgment?] Only as far as regards the present application. This Court will reverse that which the plaintiff in error seeks to reverse, or will refuse to do so. [PARKE, B. We must reverse all that we find to be erroneous. This subject, and the authorities, were considered in *Gregory v. The Duke of Brunswick*, 3 Com. B. 481.] (Reference was also made, in this part of the argument, to 3 Bac. Abr. 118 (7th ed.), tit. *Error* (M) 2, *Rex v. Bourne*, 7 A. & E. 58, *Gildart v. Gladstone*, 12 East, 668, and note (s) to *Jaques v. Cesar*, 2 Wms. Saund. 101, cc. 6th ed.: but it is not thought necessary to report the argument at more length, as the judgment did not turn upon it. See *supra*, as to criminal cases, stat. 11 & 12 Vict. c. 78, s. 5.)

Even if "felony" be not nomen collectivum, the conviction on this record must be taken as referring to the felony last before mentioned; the "felony aforesaid" must mean the felony in the second count; *Rex v. Richards*, 1 M. & Rob. 177, and the note to that case, support this construction. The verdict, as far as regards that count, is good; and the defendants might have received judgment upon it. Therefore they cannot be tried again upon this record. [ALDERSON, B. The last antecedent to "aforesaid" in the convicting part is "the felony in the indictment aforesaid above specified."]

Waddington, contra. First. Whenever the verdict is such that no

valid judgment can be given upon it, *whether from the faulty constitution of the jury, their conduct, or the nature of the verdict [*822 itself, the Court which reviews it should award a venire de novo; *Rex v. Wayner*, Hil. 8 H. 7 (cited in *Rex v. Huggins*, 2 Ld Raym. 1585; S. C. 2 Stra. 887, 8, and in *Wedderburn's Case*, Fost. C. L. 22, 27), supports this proposition and answers the suggestion that a venire de novo can issue only where the party has not been in jeopardy. There, on a prosecution for murder, the jury took a written verdict from the hands of the prisoner, and brought it in as their own; and the jury were discharged of the prisoner, and a new venire awarded. In *Arundel's Case*, 6 Rep. 14 a, where the crime charged was capital, a venire de novo was awarded. There, indeed, the Court gave as a reason that the defendant's life had never been in jeopardy. But in *Rex v. Keite*, 1 Ld. Raym. 138, where a jury to which no objection was made gave a defective verdict in a case of capital felony, *HOLT*, C. J., said: "If the verdict is imperfect, no judgment can be given, but a venire de novo ought to issue. For though it is a special verdict, yet it cannot be amended by the notes in felony, as it might in civil cases." And two other Judges expressed the same opinion. No venire de novo issued in that case; but, on objections to the indictment, it was quashed with the consent of the Crown, and the prisoner was bailed, to be tried at the next assizes. It cannot be said that the prisoner, there, was not in jeopardy by the verdict, if the indictment had been good. In *Rex v. Huggins*, 2 Ld. Raym. 1585, "the Judges came to no resolution, that a venire facias de novo could not *issue after a special verdict in any capital case; it being [*828 unnecessary for them to determine that question;" for they held that the "verdict was not so uncertain, as that judgment could not be given upon it." (*Waddington* here commented on the expressions used in several contemporaneous reports of *Rex v. Keite*, 1 Ld. Raym. 138, 141, Comb. 406, Skinn. 666, Holt, 481, and *Rex v. Huggins*, 2 Ld. Raym. 1574, 2 Stra. 882, 1 Barnard. K. B. 358, 396: but the course taken by the Court in deciding the present case makes it unnecessary to report this part of the argument at length.) [*ALDERSON*, B. Can there be a venire de novo on a special verdict? *PARKE*, B. There may if the facts are imperfectly found.] This Court grants it on special verdict in civil cases. It has been done lately. (a) In *Rex v. Hayes*, 2 Ld. Raym. 1518, 1521, the Court, referring to civil cases which had been cited in argument, said: "If a jury finds but part of the matter put in issue, and says nothing as to the rest; the verdict is ill, and a venire facias de novo shall issue, if no judgment is given; but if judgment is given upon such verdict, it shall be reversed. So if a special verdict is imperfect, and don't take in the whole in issue, a venire facias de novo shall be granted. Or if the special verdict is such, that no judgment can be given upon it, as the case cited of *Cro. Jac. 51*. (b) But then the Court held,

(a) See *Tancred v. Christy*, 12 M. & W. 316.

(b) *Auncelme v. Auncelme*, *Cro. Jac. 51*.

that in this case, as the Not guilty went to the whole indictment, so the verdict was found as to all the offences charged in the indictment." Here the granting of a venire de novo is treated as subject to those conditions *824] in a criminal case *which prevailed in a civil one; and no distinction is noticed as to the matter in issue being a felony, or the party charged having been in jeopardy. Nor was this latter circumstance relied upon in *Rex v. Woodfall*, 5 Burr. 2661, 2669, where the verdict was pronounced by a competent jury, and a venire de novo was granted because the verdict was ambiguous. In *Rex v. Fowler*, 4 B. & Ald. 273, where the county justices in quarter sessions had set aside a verdict and awarded a venire de novo for misconduct of a jurymen, this Court, in effect, recognised their authority to grant the venire. It was returnable at the next quarter sessions, and rightly; for the sessions were the same court, though consisting of different justices. That was a case of felony, and the defendant had been in jeopardy. *Gray v. The Queen*, 11 Cl. & Fin. 427, is the only instance which has been found of a venire de novo being ordered by a court of error in a case of felony: but it is an express authority. There a trial and conviction had taken place, and the verdict was good in itself. Much of the argument now urged on the other side would have been applicable; yet the House of Lords directed the Irish Court of Queen's Bench to award a venire de novo. (a) The *825] decisions, therefore, show that on *this point there is no distinction between criminal and civil cases.

Then it is contended that, even in civil cases, a venire de novo is not granted where the proceedings originate in an inferior court. But that is where the Court is of an inferior nature, as in *Trevor v. Wall*, 1 T. R. 151. And the language of the Court of Queen's Bench in that case (which was adopted as a governing authority in *Bishop v. Kaye*, 3 B. & Ald. 605) shows that the rule is one of practice (like the refusing to grant a new trial where damages are below 20*l.*), not of right. The practice has probably been grounded on the cases in which it has been held that an inferior court cannot grant a new trial; *The Case of the Mayor and Aldermen of Bristol*, 2 Salk. 650, (b) *Brooke v. Ewers*, 1 Stra.

(a) *Waddington* read the following entry on the record in *Gray v. The Queen*. "At which day, before our Lady the Queen and the Peers in the same Court of Parliament, now here at Westminster in the county of Middlesex assembled, come as well the said Samuel Gray by his attorney as the said Walter Bourne, coroner, and attorney of our said Lady the Queen, who prosecutes for our said Lady the Queen in this behalf. Whereupon, all and singular the premises having been seen, and by the said Court of Parliament now here fully understood, and as well the record and proceedings aforesaid, and the judgment thereupon given, as also the several matters before assigned for error, being diligently examined and inspected, and mature deliberation thereupon had: It appears to the said Court of Parliament now here, that the judgment before given is erroneous. Therefore it is considered and adjudged by the same Court of Parliament that such judgment be, and the same is hereby, accordingly, reversed; and that the Court of Queen's Bench in Ireland do award a venire facias de novo, and proceed according to law; and that the record aforesaid be remitted to the said Court of Queen's Bench in Ireland."

See authorities collected in note (a) to *Davies v. Pierce*, 2 T. R. 125, 126.

(b) See *Regina v. Hill*, 1 Salk. 201.

113, *Bayly v. Boorne*, 1 Stra. 892, *Regina v. Hill*, 1 Salk. 201, *Rex v. Peters*, 1 Burr. 568, 571. But, further, "the Court of Quarter Sessions is a court of oyer and terminer, and is not a court of inferior jurisdiction;" *Rex v. Smith*, 8 B. & C. 341, 343, per Lord TENTERDEN, C. J. In *Rex v. Fowler*, already cited, the proceeding was at quarter sessions.

*It has been suggested, as a difficulty, that the record is no longer in the original court, but in the Queen's Bench. But, in *Corner's Crown Practice*, 102, tit. *Error*, it is said that "the return" to a writ of error "is made by annexing the engrossment of the record of the judgment (the original indictment need not be returned), and by endorsing the writ," &c. The writ of error does not of itself remove the indictment; and there has been no certiorari. It is not correct to say that, on writ of error, even before stat. 11 G. 4 & 1 W. 4, c. 70, the record itself went from the original court: this appears from *Richardson v. Mellish*, 3 Bing. 334. [MAULE, J. A record remains, and a record is sent up; the difficulties have arisen from imagining that there is but one record.] (a) *O'Connell v. The Queen*, 11 Cl. & Fin. 155, seems to be an authority against you, negatively at least, as no venire de novo was granted there. WILDE, C. J. None was asked for.] No question was put to the Judges on the subject. And there were some good counts. If the Attorney General would have entered a nolle prosequi on the others, a judgment could have been given. As to the record, there is, in the view of the law, a complete record now in the Court of quarter sessions. [MAULE, J. The regular record of quarter sessions would have one caption to a number of indictments. That shows that the record of this case is not sent up exactly as it is, but something is transcribed.]

If it has been rightly argued that the Court of *Queen's Bench ought itself to have awarded a venire de novo instead of remitting the case to the Court below, this Court can now give the proper judgment. It is argued that this cannot be done, because the plaintiff in error seeks only a reversal, and there is no writ of error prosecuted by the Crown. [PARKE, B. I thought that point had been settled by *Gildart v. Gladstone*, 12 East, 668; (b) but doubts have been raised upon it since.] The Court of error must give the judgment which appears right on the whole record, though the writ of error is brought by defendants. In *Rex v. Ellis*, 5 B. & C. 395, and *Rex v. Bourne*, 7 A. & E. 58, the attention of the Court of King's Bench was not drawn to stat. 6 H. 8, c. 6, which gives the Justices of that Court authority "by their discretions, to remand" felons, with their indictments, to the counties in which the felonies were done, and to command all justices of gaol delivery, &c., to proceed on the indictments. In *Rex v. Ken-*

(a) His Lordship referred to a late patent case before the Exchequer Chamber; probably *Bynner v. The Queen*, 9 Q. B. 523.

(b) See *Pollitt v. Forrest*, p. 949, post.

worthy, 1 B. & C. 711, where the Court below had, in effect, pronounced no judgment, ABBOTT, C. J., said: "There is no doubt that, at common law, where the punishment is not discretionary, the record of an inferior court may be removed into this Court, and we may pronounce judgment." But in *Rex v. Kenworthy* it was required by statute (2 G. 2, c. 25, s. 2), that the sentence should be pronounced by the Court before which the party was convicted; and therefore the case was remitted for judgment to the Court of Assizes at Chester. [MAULE, J. The Chief Justice of Chester was at that time a continuing officer.] No mention was made *828] of stat. 6 H. 8, *c. 6. In *Rex v. Ellis*, where the Court of King's Bench, as a court of error, declined to pass any sentence, the punishment, under stat. 4 G. 1, c. 11, s. 1, was discretionary, and the Court could neither pass the sentence, not having tried the prisoner, nor award a *judicare de novo* to the Court which had tried and sentenced. But in *Rex v. Bourne*, Lord DENMAN, C. J., and LITTLERDALE, J., appear to have acted upon *Rex v. Ellis* as a decisive authority, not bearing in mind that the punishment in Bourne's case was ascertained by statute (7 & 8 G. 4, c. 29, s. 11), and not discretionary. PATTERSON, J., is indeed reported to have said: "As to the argument that this Court cannot interfere because the punishment is discretionary, I think it is far best to proceed by a broad rule, and to say that the discretion makes no difference:" but this can hardly be an accurate representation of the judgment. [ALDERSON, B. If the remark be confined to the sending back a judgment of one session to be reviewed at another, it is very clear.]

It has been suggested that the Court of Queen's Bench should itself have ordered the *venire de novo* (if it could issue), and not have directed the Court below to award it. It may be admitted that the former course might have been taken; but the latter agrees with established practice; *Kynaston v. The Mayor, &c., of Shrewsbury*, 2 Stra. 1061, and the authorities cited in note (2) to that case; *Kent v. Kent*, 2 Stra. 971. [PLATT, B. In *Clement v. Lewis*, 3 B. & B. 297, the Exchequer Chamber directed the Court below to award a *venire de novo*.] The Court *829] of error itself awarded it in *Angle v. Alexander*, 7 Bing. 119, and in *Gray v. The Queen*, 11 Cl. & Fin. 427.(a) There is nothing to prevent the Recorder from issuing the *venire*. The ordinary Quarter Sessions had the power, generally, of summoning juries, and must have been supposed, at least, to issue a distinct *venire* in each case; 4 Hawk. P. C. 375, 6, B. 2, c. 41, s. 1 (7th ed.), 3 Burn's Justice, 958, et seq., tit. *Jurors*, sect. 7.(b) and the Recorder, by stat. 5 & 6 W. 4, c. 76, s. 105, has the same power as a Court of Quarter Sessions to do all things necessary to the jurisdiction of such a court. Sect. 121 provides generally for the return of jurors to try all the issues joined at the sessions, but does not modify the practice as to the trial of such issues respectively.

(a) But see p. 224, note (d), *supra*.

(b) 33 (Barn & Chitty's) ed.

The question remains, whether, if the Court think that the verdict at sessions was right, (a) judgment can be given here that the defendants *cannot sine die*? [*Peacock*. The defendants ask only to have the judgment of the Queen's Bench reversed as to the *venire de novo*. But, if this court think the judgment of the Sessions erroneous, they may reverse that. MAULE, J. Can the defendants say that we may not give the precise judgment which the Queen's Bench ought to have given?] A distinction as to this point is drawn in Serjt. Williams's note (1) to *Jaques v. Cesar*, 2 Wms. Saund. 101 cc, 6th ed., between writs of error by plaintiff and by defendant; but, in note (5) to that case in the last edition (note (2) in the fifth), the distinction is treated as no longer tenable, *and it is said that "the judgment shall be the same as that which [*830 the Court below ought to have given." [PARKE, B. If we are merely to reverse the judgment here, without giving any other, it seems that we must reverse it in toto.] That is so. A *venire de novo* was awarded by the Exchequer Chamber in *Trafford v. The King*, 8 Bing. 204, on an imperfect special verdict; the writ of error being brought by the defendants below. *Conway and Lynch v. The Queen*, 7 Irish Law Rep. 149 (Q. B. Hil. 1845), may be cited on the other side to show that, if there be no legal verdict, the defendants ought to stand as if acquitted; but the language of CRAMPTON, J. (p. 178), there is strongly in favour of a *venire de novo*. [ALDERSON, B., cited the beginning of Lord MANSFIELD's judgment in *Rex v. Shipley*, 4 Doug. 73, 162.]

Peacock, in reply. No case of felony has been cited in which a *venire de novo* has been awarded simply on account of an imperfect verdict. *Gray v. The Queen*, 11 Cl. & Fin. 427, for instance, was a case of mistrial. A prisoner is in jeopardy if, on the pronouncing of the verdict, he would be liable to punishment but for something subsequent. [ALDERSON, B. That is, if he is in jeopardy of judgment; but he is not so if the verdict is defective.] The passage cited on the other side from *Rex v. Hayes*, 2 Ld. Raym. 1521, is only a dictum. The same remark applies to the expressions which have been referred to in *Rex v. Keite*, 1 Ld. Raym. 141. The uncertainty of the verdict there is noticed by Lord HARDWICKE in *Rex v. Burrige*, 8 P. Wms. 489, 498. *In *Rex v. Woodfall*, 5 Burr. 2661, 2669, the award of the *venire de* [*881 *novo* was a concession to the defendant. [WILDE, C. J. Was not the verdict uncertain, at least to the extent that no judgment could be given upon it? I should have thought it an acquittal. MAULE, J. It was no great favour to the defendant to send the case back for trial, when, as it stood, there could have been no judgment] In *Conway and Lynch v. The Queen*, (b) the judgments of the majority of the Court, as far as they

(a) Waddington said he should not now contend that felony was *nomen collectivum*, having argued on the contrary assumption in the Queen's Bench.

(b) As to the defendant's consent to a dismissal of the jury or postponement of the trial, ALDERSON, B., cited *Rex v. Woolf*, 1 Chitt. Rep. 401, 420.

bear on this case, are in favour of the present plaintiffs in error. CRAMPTON, J., there admits that the taking of an imperfect verdict is the same in effect as discharging the jury without their having given any verdict. Here, in effect, the jury have been so discharged. Two felonies being alleged, they have convicted of "the felony aforesaid," not saying which, and, therefore, as to one felony, have given no verdict. If the defendants were tried again, it would be uncertain which was the offence for which they were to be tried.

The Court of error cannot give the judgment which the Court below ought to have given; for it cannot know the facts. This was so held by the Irish Court of Queen's Bench in *Regina v. Houston*, 4 Irish Law Rep. 174 (Q. B. Hil. 1842), where, on demurrer to an indictment, the defendant had judgment at the assizes, and the court of error reversed the judgment but refused to pass a sentence. [ALDERSON, B. No one could have been authorized to do so in that case. PARKE, B. In a *832] civil case the plaintiff in error comes to *be relieved from a judgment for the defendant, and to be remitted to his own right; but then the question arises, how the Court of error can know what that right is. MAULE, J. Is there any instance in which a Court of error has pronounced the judgment in a criminal case? None has been found. In *Rex v. Kenworthy*, 1 B. & C. 711, the Court below was directed to give the judgment.

There is no record in the Court below, on which the defendant could be tried again; for that which is sent to the Court of Queen's Bench becomes the record, and that which remains in the Court below ceases to be the record; *Coot v. Lynch*, 1 Ld. Raym. 427. On this point, 9 Vin. Abr. 516, &c., tit. *Error* (P), pl. 1, 2, 15, 17,—18 Vin. Abr. 179, tit. *Record* (K), pl. 1,—7 Vin. Abr. 33, tit. *Court* (a 9), pl. 7, 8,—may also be referred to. In the last cited placitum it is said that the record shall not be remanded "where both Courts are at common law, as the Chancery and B. R. in case of a traverse, &c., or other issue joined in Chancery; for this shall be tried in B. R. and there shall remain, and there judgment shall be given." [WILDE, C. J. The reason given implies that the record shall not go back if justice can be effectually administered where it is. *Waddington* mentioned the Baron de Bode's Case, 8 Q. B. 208, and *Bynner v. The Queen*, 9 Q. B. 523.]

Nothing prevents this Court from reversing the judgment of the Queen's Bench as to the venire de novo, leaving the residue untouched: as to that a cross writ of error may be brought. [PARKE, B. This subject was *833] much considered in *Gregory v. the Duke of Brunswick*, 3 Com. B. 481. ROLFE, B. Your assignment of errors, and the prayer, extend to the whole judgment.] The parties complain of the judgment so far only as it is against them. At all events they are not bound by the prayer. [WILDE, C. J., referred to 3 Bac. Abr. 118 (ed. 7), tit. *Error* (M), 2, from "If judgment be given," to "which the first court

might have done.']) The authorities show that the plaintiff in error is entitled to have that undone which was done against him, and that done which ought to have been done for him.(a) [MAULE, J. The judgment in the Queen's Bench is that the verdict and judgment below be "set aside and annulled," not "reversed."(b)] This Court might, if it saw occasion, reverse the judgment of the Sessions. That a judgment may be reversed for so much as a plaintiff in error complains of, appears from *Smith v. Shuldham*.(c) [WILDE, C. J. The cause there was between individuals, not between a party and the Crown. And cross writs of error were brought, so that the judgments might be considered as independent of each other. Here it is a question whether we have not before us an entire judgment, which we must correct wholly if at all.]

Then, if the whole record be looked to, the judgment of the Sessions is bad, and ought to be reversed, the indictment showing two offences, and the verdict being found, and sentence passed, for one only, and not distinctly applied to either. (The judgment of the Court *renders [834 it unnecessary to detail the arguments on this point. The authorities discussed were: as to the indictment, *Rex v. Powell*, 2 B. & Ad. 75, *O'Connell v. The Queen*, 11 Cl. & Fin. 155, *O'Brian's Case*, 1 Den. C. C. 9, *Rex v. Hayes*, 2 Ld. Raym. 1518, *Harris v. Evans*, Orl. Bridg. 547, 558, *Deere v. Ivey*, 4 Q. B. 379, *Taylor v. Cole*, 8 T. R. 292; as to the verdict and judgment, *Rex v. Bourne*, 7 A. & E. 58, *Rex v. Walcott*, 4 Mod. 395, *O'Brian's case*, and *Downing's case*, 1 Den. C. C. 52.)

Waddington (being permitted to reply on this point) contended that the Sessions had given a right judgment; for that, construing the record ut res magis valeat, it must be taken, either that the jury found only one offence to have been committed (which was consistent with the language of the record as to the pleading and bringing in of the verdict), or, if there were two offences found, that a judgment of ten years' transportation had been passed for the offence charged in the first count, and a judgment of seven years, included in the ten, for the offence in the second. As to the first supposition, he urged that the same offence might be charged in two different counts without the use of the word "other." And, as to the second, he referred to stat. 7 & 8 G. 4, c. 28, s. 10, which empowers courts, in cases of felony, to make a second sentence of imprisonment or transportation take effect from the expiration of the first, thus implying that, in the absence of such enactment, the two sentences would have been concurrent. And he referred to the judgment of Lord CAMPBELL in *O'Connell v. The Queen*, 11 Cl. & Fin. 417.

**Peacock*, as to the last point, contended that the Court could [835 not form conjectures as to the intended application of the sen-

(a) *Waddington* referred to Com. Dig. *Pleader* (3 B 20) on this point.

(b) *Waddington* stated that the expression had been used advisedly, as most applicable here.

(c) *Macqueen's Practical Treatise on the Appellate Jurisdiction, &c., of The House of Lords* &c., 420.

tence, but must look to what had been done: and that some part of the judgment must be ascribed distinctly to the second count.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.

This case came before us upon a writ of error upon a judgment of the Court of Queen's Bench reversing a judgment of the Court of Quarter sessions held in and for the city and county of the city of Chester, and directing the award of a venire facias de novo. It appears by the record that the judgment reversed was pronounced upon an indictment which contained two counts; the one count charging a stealing of certain moneys above the value of 5*l.* in a dwelling-house, the other count charging simply a stealing of moneys of the same description as those contained in the first count. The jury process directed the jury to be summoned to inquire if the plaintiffs in error were guilty of the felony in the indictment specified; and the verdict as set forth found the said plaintiffs guilty of the felony aforesaid. Upon this verdict the plaintiffs in error were adjudged to be transported for ten years.

Upon this judgment error was brought in the Court of Queen's Bench; and, upon the argument in that Court, it was contended that the judgment was erroneous and ought to be reversed. The objection mainly relied upon to reverse the judgment was, that the verdict was uncertain, and could not be made the foundation of any legal judgment, because the

*836] indictment contained two counts charging distinct offences, and to which different judgments were applicable, and that, the finding of the jury being that the plaintiffs in error were guilty of "the felony aforesaid," in the singular number, it could not be deemed to include a finding upon both counts, and the Court had no authority to apply it to either count in particular; and, as the judgment of transportation for ten years was applicable only to the more aggravated offence, charged in the first count, therefore the judgment pronounced by the Court of Quarter sessions was erroneous and ought to be reversed.

The Court of Queen's Bench pronounced a judgment of reversal, with a direction that a venire de novo should be awarded by the Court of Quarter sessions: and upon that judgment the present writ of error was brought; and the case was ably argued before us at the sittings after last Michaelmas term, when numerous authorities were referred to, and it was contended, upon the part of the plaintiffs in error, that the judgment of the Court of Queen's Bench was erroneous in the respect of having directed the Court of Quarter sessions to award a venire de novo, and that so much of the judgment as contained that direction ought to be reversed. Upon the part of the Crown it was contended that the original judgment of the Court of Quarter sessions was right, and ought not to have been reversed, but that, if the judgment of reversal was right, the direction to award a venire facias de novo properly formed a part of the judgment.

We have considered the arguments urged before us, and have referred to the numerous authorities which *were cited in the course of them. [*837 And we are of opinion that the judgment of the Court of Queen's Bench must be affirmed. We have had some doubt whether the original judgment of the Court of Quarter sessions was wrong, and whether that judgment ought not simply to have been affirmed on the ground that the term "felony" was *nomen collectivum* as well as the term "misdemeanor," and that, both the counts being good and both found to be true, the case fell within the principle of the decision of *Rex v. Powell*, which was certainly not expressly overruled by the decision of the House of Lords in *O'Connell v. The Queen*, which proceeded mainly on the ground that judgment was given, in part at least, on a bad count. If the word "felony" ought to be deemed to be *nomen collectivum*, in that case no judgment would have been given for what was not an offence, both the counts being good, nor any which the record would not warrant. It is unnecessary, however, to determine that question; for, on referring to the language of the precedents, we agree in the construction put by the Court of Queen's Bench on the term "felony." It is said that the practice of the officer in open Court on an indictment for felony, though it may contain several counts, is to ask the jury if he be guilty of the felony aforesaid; but, if such be the practice, the record itself, where there are two counts, states the jury to find the prisoner guilty of *the several felonies and trespasses aforesaid*; see *Co. Entr.* 852 *b*; (a) and where two acts of treason, *de proditionibus prædictis*, *ib.* 860 *b*, 361 *a*. Where the award of a venire is to try *one felony*, it is to try whether he be *guilty [*838 of a *certain felony and murder*; *Arundel's Case*, *Tremaine's P.* [C. 271. These authorities are sufficient, we think, to warrant the opinion of the Court of Queen's Bench that the term "felony" does not, in the award of the venire in this case, mean more than one felony. Assuming that the two counts are *primâ facie* for different offences, and without expressing our concurrence in the opinion propounded by the Court of Queen's Bench, that they *must* be, and that the indictment would be bad if it appeared that they were for the same, we think that the judgment of the Court of Queen's Bench was right in directing the Court of Quarter sessions to award a venire de novo.

Many objections were taken to this proceeding on the part of the plaintiff in error. The principal one was that no venire de novo could be awarded on a charge of felony for any default of the jury in finding an improper verdict. It was admitted that it could so issue, even in a capital case, for misawarding the jury process; and *Arundel's Case*, 6 Rep. 14 *a*, is a direct authority to that effect. But it was said that the reason there assigned was that the prisoner's life was never in jeopardy, because no verdict could have been found by that jury which could have been good; and it was argued that it was never granted where life had been in

jeopardy, which it was contended was the case where there was a proper jury process but an imperfect verdict, because the jury *might* have found a verdict on which judgment of death might have been pronounced. If the power was so confined, this is a case of a misawarding of jury process, for the award is to try one *crime only; and it is uncertain *839] which, where two are charged; and therefore the jury never had a valid authority to give a verdict which could affect the plaintiff's life, *supposing that doctrine to apply* to all felonies, including that from which the punishment of death has been taken away, as probably would be held since the decision of *Gray v. The Queen*, 11 Cl. & Fin. 427.

And this is sufficient for the decision of the principal point in this case; and it is not necessary to pronounce an opinion upon the question, which the authorities leave in some doubt, whether a venire de novo may issue, in a case of felony, for a defective verdict, a question which Lord HOLT, in the case of *Rex v. Keite*, 1 Ld. Raym. 138, did not decide: and Lord HARDWICKE says, in *Rex v. Burridge*, 3 P. Wms. 439, 499, that Lord HOLT himself took exceptions to the indictment in the case of *Rex v. Keite* in order to avoid it.

Assuming, then, that a venire de novo might be awarded in this case before judgment if the indictment were pending in the Queen's Bench, it was still insisted, on the part of the plaintiff in error, that it could not in this particular case for two reasons. 1. Because judgment had already been given; and it was contended that, though *before* judgment a venire de novo might issue in an indictment for felony, after judgment it was too late, and the judgment must be reversed simpliciter; 2. Because a venire de novo could not issue to the Court of quarter sessions.

The first of these positions is rested on the dictum of Lord HOLT, giving the judgment of the Court in *Rex v. Hayes*, 2 Ld. Raym. 1521.

It is said that the Court agreed that the *cases cited from Co. Litt. *840] 227 a and Cro. Eliz. 133(a) are certainly law; for, if a jury finds but part of the matter in issue, and says nothing as to the rest, the verdict is ill, and a venire de novo shall issue if no judgment is given, but if a judgment is given on such verdict it shall be *reversed*: and it was argued on the part of the plaintiffs in error that the meaning was that the judgment should be reversed and nothing more done. It is perfectly clear that such could not be Lord HOLT's meaning; for he is speaking of civil cases, and as to those there is no doubt that, where the verdict is defective, a venire de novo issues after the judgment reversed as well as before. Lord HOLT meant, no doubt, not that the judgment should be reversed merely, but that it should be reversed and a venire issue also. It is clear that in a misdemeanor there may be a venire de novo after the judgment; see *Rex v. Trafford*, 8 Bing. 204: and in a felony also it was done in *Gray v. The Queen*. We think, therefore, that this objection cannot prevail.

Nor do we think that the direction to the court of quarter sessions to

(a) *Finnymore v. Sanky*.

award a venire de novo is void. It has been held that a venire de novo will not lie to an inferior Court of record in a civil action, in *Trevor v. Wall*, 1 T. R. 151, confirmed by *Bishop v. Kaye*, 3 B. & Ald. 605: we suppose by analogy to the rule which prevents a judge of an inferior court from granting a new trial on the merits. This rule does not extend to a new trial for irregularity; and a venire facias de novo might possibly issue, even to an inferior court, where the *objection to the verdict was irregularity of the constitution of the jury. Whether this be so or not, we think the answer to the [*841 objection is, that a Court of oyer and terminer (as the Court of quarter session is, though not usually so called), is not an *inferior* court in the sense of that term where it is said that a venire facias de novo cannot go to an inferior court. Lord TENTERDEN, in *Rex v. Smith*, 8 B. & C. 342, 3, expressly says that the Court of quarter sessions is not a court of inferior jurisdiction, when the question was whether its minutes were receivable in evidence.

It was also argued that, if a venire facias de novo could issue to another court, it could not to the Court of quarter sessions, because it was not a continuing court. There are two answers to this objection. First: That this is the Recorder's court, in which there is not a succession of commissioners, the Recorder alone presiding: and, secondly: That the ordinary Court of quarter sessions is a continuing court of oyer and terminer, and has been so recently held by the Queen's Bench, who decided that a person put under a recognisance at one session to appear and receive judgment might be sentenced at a session long subsequent. (a)

For these reasons we think the judgment must be affirmed.

Judgment of the Queen's Bench affirmed.

(a) See *Keen v. The Queen*, 10 Q. B. 928.

*The QUEEN, on the prosecution of the Churchwardens and Overseers of the Parish of BIRMINGHAM, *v. PHILLIPS* [*842 and MELSON, Esquires, Justices of the Peace for the Borough of BIRMINGHAM. [*Feb.* 26, 1846.] Reported, 8 Q. B. 745.

FORD *v.* WILLIAM BEECH. [*Dec.* 17, 1846.]

To a declaration, the first and second counts of which severally charged defendant as maker of two promissory notes, and the third count as acceptor of a bill of exchange on which it was averred that 15*l.* remained unpaid, with counts for money lent and on an account stated, defendant pleaded, *inter alia*, special pleas to the counts on the promissory notes and the money counts, which on the trial were found for him, and a plea of set-off to the whole declaration, to which the plaintiff replied Not indebted. Plaintiff by his particulars claimed in respect of the

bill of exchange 15*l.*, only, and defendant, under his plea of set-off, proved that plaintiff was indebted to him in more than 15*l.*, but not to an amount which would cover that sum together with the amount of the promissory notes in the first and second counts.

Held, that defendant was entitled to the verdict on the issue joined on the plea of set-off, but that it ought to be entered specially, "that the plaintiff before and at the time of the commencement of the suit was indebted to the defendant in a larger sum than the sum of 15*l.*;" and that upon such verdict defendant was entitled to judgment on the whole record.

ASSUMPSIT. The first count was upon a promissory note for 140*l.*, dated 28d May, 1839, made by defendant, payable to plaintiff. The second count on another promissory note, for 200*l.*, bearing date the same day, and also made by defendant, and payable to plaintiff. The third count was upon a bill of exchange for 210*l.*, dated 26th September, 1843, drawn by plaintiff and accepted by defendant; averment that, although defendant paid plaintiff 195*l.*, parcel, &c., the residue remained unpaid. Fourth and fifth counts, for money lent, and on an account stated.

The defendant, by his first three pleas (pleaded severally to the first, second, and third counts), denied that he made the notes, and that he accepted the bill.

*Fourthly, he pleaded to the rest of the declaration Non *843] assumpsit.

Plea 5: to the first and second counts: That, after the making of the notes, and after they became due, to wit, on, &c., it was mutually agreed, between plaintiff, defendant, and one Alfred Beech, that A. Beech should, at the request of plaintiff, pay to plaintiff, in trust for one Elizabeth Beech, 200*l.* for her sole use, or 25*l.* per annum so long as the said 200*l.* should remain unpaid; which said sum of 25*l.* it was then further agreed should be paid quarterly, to wit, on, &c.; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes in the first and second counts mentioned, respectively, should be suspended so long as the said A. B. should continue to pay the sum of 6*l.* 5*s.* every quarter; and that the said payments should commence from 25th December, 1843: That A. B., afterwards, to wit, on, &c. (a quarter day), duly paid plaintiff the 6*l.* 5*s.*, being the first quarterly payment; and on every quarterly day of payment hitherto hath paid the said quarterly, &c., according to the true, &c., of the said agreement: verification.

Plea 6: to the fourth and fifth counts, so far as they relate to 200*l.*, parcel of the moneys in those counts mentioned, that the account mentioned in the fifth count to have been stated, so far as relates to 200*l.*, parcel thereof, was had and stated of and concerning the sum of money in the fourth count mentioned, so far as relates to 200*l.*, parcel of the last-mentioned money: and that the sum of 200*l.*, parcel of the moneys in the fourth count mentioned, and the sum of 200*l.*, parcel of the moneys in the last count mentioned, are one and the same sum: Averment that *844] the second sum *of 200*l.*, parcel of the moneys in those counts mentioned, being so due to the plaintiff as in those counts

mentioned, in order to secure to plaintiff payment thereof, defendant made and delivered to plaintiff two several promissory notes; to wit, the promissory notes in the first and second counts mentioned. The plea then averred that, after the notes became due, to wit, on, &c., it was mutually agreed, &c. (as in plea 5, averring performance as there). Verification.

Plea 7: to the whole declaration: payment and acceptance of 200*l.*, in full satisfaction and discharge of the damages sustained by plaintiff by reason of the non-performance of the promises in the declaration mentioned.

Plea 8: to the whole declaration: set-off for goods sold, money lent, had and received, interest, and on an account stated.

Replication, joining issue on the first four pleas. To the fifth, a denial that Alfred Beech paid the sum of 6*l.* 5*s.* in respect of the first quarterly payment of 25*l.* The same to the sixth plea. To the seventh: that plaintiff did not accept the sum in that plea mentioned in discharge of the damages, &c. To the set-off, Not indebted.

Rejoinder, joining issue on the traverses taken in the replication.

On the trial, before WIGHTMAN, J., at the Middlesex sittings after Trinity term, 1845, it appeared that the particulars claimed 840*l.*, the amount of the promissory notes in the declaration, and 15*l.*, the balance due on the bill of exchange in the third count, and interest. The amount proved under the set-off at the trial covered the 15*l.* and the interest. A verdict was found *for the plaintiff on the first, second, third, [*845 seventh, and eighth issues, and for the defendant on the fourth, fifth, and sixth, with liberty to move to enter the verdict for defendant on the eighth issue also. In Michaelmas term, 1845, a rule was obtained accordingly. In Trinity vacation, 1846,(a)

Humfrey, and *F. V. Lee*, appeared to show cause: but the Court called on

Knowles and *Cross*, in support of the rule. It is objected that the defendant is not entitled to the verdict on the plea of set-off, because it is pleaded to the whole declaration, and the defendant has failed to prove a set-off covering the whole demand in the declaration. But the true rule is that, if the defendant by his other pleas get rid of the bulk of the plaintiff's demand, and under the set-off prove a debt due from the plaintiff to him sufficient to cover the residue, he is entitled to a verdict on that plea. In *Moore v. Butlin*, 7 A. & E. 595, the question was whether the plea of set-off were divisible, and the Court held that it was not, in the sense of being pleaded separately to each count. Lord DENMAN, C. J., said, in giving the judgment of the Court: "as the set-off is pleaded to the whole, the issue on it is a single one, and the plaintiff is entitled to a verdict, unless the defendant proves a set-off exceeding or equaling the whole of the plaintiff's aggregate demands:"

but he goes on to say: "this view of the question will not prevent the *846] defendant from availing himself of any other defence *stated on the record, such as payment, or the Statute of Limitations, by which he may be able so to reduce the plaintiff's aggregate demand, as that his set-off may cover the remainder, for to that extent the plea of set-off is divisible, or rather it must be found wholly for the defendant, not partly for him and partly for the plaintiff." That is what has been done here; the plaintiff's aggregate demand has been reduced by the special pleas, which answer the counts on the promissory notes, to the balance of 15*l.* due on the bill of exchange, and a set-off has been proved which overtops that sum. The rule to be deduced from *Moore v. Butlin*, 7 A. & E. 595, is that the plea of set-off is not divisible if pleaded alone; but, when it is pleaded in conjunction with other pleas, the issue on it must be found for the defendant if the sums proved under it cover that portion of the plaintiff's demand which is left unanswered by the other pleas. This only confirms the rule laid down in *Tuck v. Tuck*, 5 M. & W. 109, and earlier in *Cousins v. Paddon*, 2 Cr. M. & R. 547, S. C. 5 Tyr. 585. In the first of these cases Lord ABINGER stated the general rule that, "if a party plead a special plea, and fail in proving any part, he fails in proving the whole;" but he added this exception: "if, indeed, a defendant prove portions of several pleas, none of which by itself covers the whole debt, but which taken together will do so, he is entitled to have the verdict entered for him: for instance, it might turn out that there was a good answer by matter of accord and satisfaction to a part of the demand, and a valid set-off to the residue." [WIGHTMAN, J. In *847] that case ought not the set-off to be pleaded to a part?] *In *Moore v. Butlin* the set-off was pleaded to all the counts (except as to a sum paid into Court.) [WIGHTMAN, J. In an action on a bill of exchange for 200*l.*, payment being pleaded to the whole declaration, and also a set-off to the whole declaration, if the proof be of 100*l.* paid and 100*l.* due on the set-off, how is either the plea of set-off or the plea of payment proved?] On plea of payment to a declaration in assumpsit it is not necessary that the defendant prove payment of the whole sum stated in the plea, if he prove enough paid to cover the plaintiff's whole demand; *Falcon v. Benn*, 2 Q. B. 814. [WIGHTMAN, J. There it was quite uncertain what the plaintiff's demand would be; but here you have specific amounts under written instruments.] The observations of PARKER, B., in *Tuck v. Tuck*, 5 M. & W. 112,(a) show that the effect of a plea of set-off is the same whether the declaration is for a specific sum or upon an indebitatus generally. The proper construction of a plea of set-off is that upon the whole demand more is due from the plaintiff to the defendant than from defendant to plaintiff. [WIGHTMAN, J. But how is the verdict to be entered?] The rule is laid down in *Cousins v. Paddon* as to a plea of payment. Where it is proved only in part, the other

(a) See *Roche v. Champain*, 1 Exch. 16.

portion of the demand being covered by other pleas, the plea may be taken distributively, and the issue found for the defendant as to the amount proved to be paid, and as to the residue for the plaintiff. That would be the proper entry here.

The Court then called on

Humfrey and F. V. Lee, contra. Each issue must be tried by itself, as the costs depend on the issues. *Where the pleas are distributive, [*848 the defendant succeeds because he proves the issue: here he does not. No answer has been given to the case put of a bill of exchange for 200*l.*, separate pleas of payment and set-off to the whole declaration, and proof under the first plea of payment of 100*l.*, and under the second of 100*l.* due from the plaintiff to the defendant. How is the expense of the issues to be borne? This mode of pleading may have induced the plaintiff to incur the whole expense of the trial. In terms he will succeed on both issues; and yet he will not be entitled to the costs of either. The issue on the plea of set-off cannot be affected by proof that there had been payment of the difference. The plea of set-off, like that of payment of money into court, ought to be pleaded to the residue, as payment into court was pleaded in *Sharman v. Stevenson*, 2 Cr. M. & R. 75; S. C. 5 Tyr. 564. In *Tuck v. Tuck*, 5 M. & W. 113, PARKE, B., says only that the defendant is entitled to have "the general verdict" entered for him where, taking off so much of the plaintiff's claim as is answered by the other pleas, he can show under the set-off that a greater amount remains due to him than he shall be found indebted in to the plaintiff.

Cur. adv. vult.

Lord DENMAN, C. J., in Michaelmas vacation (December 17th), 1846, delivered the judgment of the Court.

This was an action of assumpsit. The first count of the declaration was upon a promissory note for 140*l.* The second count was upon another promissory note for *200*l.* The third count was upon a bill [*849 of exchange accepted by the defendant for 210*l.*, with an averment that the defendant had paid 195*l.* in part of the bill, leaving 15*l.* unpaid. There were also counts for money lent, and on an account stated. The defendant pleaded eight pleas. The first three were traverses of the making the notes and accepting the bill: the fourth was Non assumpsit to the money counts. The fifth was a special plea, to the first and second counts (upon the two promissory notes), of accord and satisfaction. The sixth was a special plea as to 200*l.*, parcel of the sums mentioned in the money counts, of accord and satisfaction. The seventh was a general plea of payment to the whole declaration; and the eighth was a general plea of set-off to the whole declaration.

Upon the trial, the jury found a verdict for the defendant on the fourth, fifth, and sixth issues; and for the plaintiff on the first, second, third, and seventh: and it was admitted, as to the eighth issue, that the plaintiff was indebted to the defendant in an amount exceeding 15*l.*, but not equal

to the amounts stated in the promissory notes and the bill of exchange. It thus appeared upon the whole case that the defendant had, by his fourth, fifth, and sixth pleas, answered the case of the plaintiff as far as regarded the counts upon the two promissory notes and the money counts, but that the plaintiff's claim to 15*l.*, remaining due upon the bill of exchange mentioned in the third count, was unanswered, except by the plea of set-off: and the question was whether, as that plea was pleaded to the whole declaration, which, if it stood alone, it did not answer, it was available as a defence to the third count, enough being proved under it *850] to answer the demand in that count, though not enough to answer the claim in that count and the others, if taken altogether. The Judge at the trial was inclined to think that, as the sums claimed in the three first counts were certain and specific, the plea of set-off should have been limited to the third count, or to so much of the declaration as it could answer, and directed a verdict for the plaintiff upon the plea of set-off, which entitled him to 15*l.* damages, with liberty to move to enter a verdict for the defendant if the Court should be of opinion that he was entitled to it under the foregoing circumstances.

The case was argued before my brother WIGHTMAN and myself in the unavoidable absence of the other Judges. And, upon consideration, we are of opinion that the case falls within the principle that may be considered established by the cases of *Cousins v. Paddon*, *Moore v. Butlin*, and *Tuck v. Tuck*, that a plea of set-off is divisible to this extent, that, if enough is proved under it to cover so much of a plaintiff's demand as is left uncovered by other pleas, the defendant is entitled to a verdict, though the set-off, if the *only* plea, would not have covered the plaintiff's whole demand.

In the present case the pleas of accord and satisfaction and Non assumpsit answer the whole of the plaintiff's demand in the present action, except that which arises under the third count; and, as the amount proved under the plea of set-off exceeded the amount of the plaintiff's claim upon the bill mentioned in the third count, the defendant's pleas taken altogether answer the whole of the plaintiff's demand.

*851] The pleas of accord and satisfaction, however, only show the accord satisfied up to the time of the action brought; and, though those pleas are an answer in the present action to those counts to which they are pleaded, they do not show any bar to the plaintiff's right to maintain an action if there should be any future breach of the accord mentioned in the pleas. Upon this state of the pleadings, if the verdict were entered generally for the defendant upon the plea of set-off, which is pleaded to the whole declaration, the plaintiff might be under some difficulty in case he brought another action upon some subsequent failure to satisfy the accord mentioned in the special pleas. We therefore think it better that the verdict on the plea of set-off should not be entered for the defendant generally, but that "the plaintiff, before and at the time

of the commencement of the suit, was indebted to the defendant in a larger sum than the sum of 15*l*." and upon that verdict the defendant would be entitled to judgment upon the whole record. This is in perfect accordance with the principle upon which the cases referred to were decided. If this case had occurred before the new rules of pleading were adopted, and Non assumpsit and a set-off had been pleaded, the same result would have followed. Rule accordingly.(a)

(a) Reported by T. Bros, Esq.

See Ford v. Beech, in Exch. Ch. p. 852, post.

*IN THE EXCHEQUER CHAMBER. [*852

(Error from the Queen's Bench.)

FORD v. BEECH.

In assumpsit by the payee of two promissory notes, for 200*l*., and 140*l*., against the maker, defendant pleaded in bar that, after the notes became due, it was mutually agreed, by plaintiff, defendant, and A., that A. should pay to plaintiff 25*l*. per annum by quarterly payments, and, as long as A. so paid, the right of action on the notes should be suspended; and that A. had hitherto made the quarterly payments.

Held, by the Court of Exchequer Chamber, after verdict for defendant on a traverse of the payment by A., that the plea offered no answer, inasmuch as, if plaintiff were barred of his action on the notes for any period, his right of action would by law be extinguished altogether, which appeared not to be the intention of the agreement; and that therefore the agreement must be construed as giving defendant merely a right of action for breach thereof if plaintiff sued while the payments were continued.

THE verdict was entered up as directed in the preceding judgment; (a) and judgment was entered on the record, with a *consideratum est*, "that the plaintiff take nothing by his said writ, but that he be in mercy, &c., and that the defendant go thereof without day, &c.;" with costs for defendant against plaintiff, and award of execution thereof.

The plaintiff brought error in the Exchequer Chamber; assigning for error, generally, that judgment ought to have been given for the plaintiff; and also that judgment ought to have been given for the plaintiff "by reason of the non-performance by the said William Beech of the promise in the said third count of the said declaration mentioned; that the said finding of the said jury on the said eighth issue (b) joined between," &c., "amounts to a finding in favour of the said John Ford; *and that judgment ought to have been given accordingly. That the said finding is imperfect, uncertain, and argumentative, and [*858 does not dispose of the whole of the said issue; and that no judgment

(a) P. 851. In Hilary term, 1847 (January 14th), *Humphrey* requested that the mode of entering the verdict might be reconsidered: but Lord DENMAN, C. J., on January 26th, said that the Court adhered to the view which they had taken.

(b) The question as to this finding was not decided in the Court of Error, counsel agreeing, in the course of the argument, to amend the eighth plea, by pleading it as to 15*l*. only.

can be given thereupon, or in respect thereof, or upon the said record and proceedings." That the fifth and sixth pleas "are not, nor is either of them, sufficient to bar the plaintiff from having or maintaining his action as to the causes of action to which those pleas are respectively pleaded. That the said pleas show an accord only, without satisfaction, or with only a partial satisfaction. That the said pleas attempt to set up, as a defence to the causes of action to which they are pleaded, an accord and satisfaction by a stranger to those causes of action. That the said pleas attempt to set up, as an answer to the causes," &c., "the payment of a less sum than the amount which they profess respectively to answer." Joinder.

The case was argued, in last Michaelmas vacation, (a) before WILDE, C. J., MAULE and E. V. WILLIAMS, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.

Pashley, for the plaintiff in error (the plaintiff below). The plaintiff is entitled to judgment non obstante veredicto on the issues upon the fifth and sixth pleas. As the sixth plea refers to the fifth, it will be sufficient to confine the argument to the fifth.

A right of action cannot, by the voluntary act of the party entitled, be suspended without being extinguished, any more than it can be transferred. Authorities on this point are collected in 2 Williams *854] *on Executors, 1124-1127 (4th ed.). That applies to actions by the holders of promissory notes; *Freakly v. Fox*, 9 B. & C. 130. An exception has indeed been introduced in the case where a note or bill, not come to maturity, has been taken by the creditor; *Stedman v. Gooch*, 1 Esp. N. P. C. 3, 5, decided at nisi prius, by Lord KENYON, in 1793; *Kearlake v. Morgan*, 5 T. R. 513, in 1794. But in *James v. Williams*, 13 M. & W. 828, 833, (b) where the last-mentioned case was cited, it was laid down that "this rule is confined to negotiable instruments alone, and it must appear on the face of the plea that the plaintiff took an interest in the negotiable instrument." In *Baker v. Walker*, 14 M. & W. 465, 468, PARKE, B., said that a promissory note "resembles a specialty:" (c) it was there held that a promissory note, given in consideration of a judgment debt, might be enforced. [PARKE, B. It wants no consideration. If I give a promissory note to A. for the debt of B., no consideration is necessary; it is payment. (d) You do not want consideration in that case, as you do in the case of an agreement.] *Price v. Price*, 16 M. & W. 232, decides that it must appear that the instrument is running, or has been endorsed over by the

(a) November 26th, 1847.

(b) Affirmed on error in Exch. Ch.; *Williams v. James*, 3 Exch. 798.

(c) Marius says (p. 1, 2d ed.) that a bill of exchange "is so noble and excellent, that though it cannot properly" (as he conceives) "be called a specialty, because it wanteth those formalities which by the common law of England are thereunto required, as seal, and delivery, and witnesses:" yet is "equivalent thereunto, if not beyond."

(d) See stat. 3 & 4 Ann. c. 9, s. 7, as to acceptance of a bill.

creditor. *Fearn v. Cochrane*, 4 Com. B. 274, *also restricts the exception: there it was contended that a plea which alleged the delivery to, and acceptance by, plaintiff of a promissory note in respect of the causes of action, and also the delivery and acceptance of a warrant of attorney in satisfaction and discharge of the note and of the causes of action, was bad for duplicity; but it was held not double, because the allegations respecting the note alone did not show satisfaction or suspension. [*855]

It is true that a note may be received in full satisfaction of a debt; *Sard v. Rhodes*, 1 M. & W. 153, S. C. Tyr. & G. 298: a note, expressly shown to have been so received, though not paid on maturity, is an answer to an action on the debt. So in *Good v. Cheesman*, 2 B. & Ad. 328, which may be cited on the other side, a valid new contract, capable of being immediately enforced, was substituted absolutely for the old one: that was in the nature of satisfaction, as was said by PARKE, J. The new contract there was an agreement by the creditors to accept payment by the debtor covenanting to pay two-thirds of his income, and giving a warrant of attorney: the consideration for any one creditor entering into that agreement was the forbearance of the rest: and the principle seems to be analogous to that of the cases where a party, by his representation, has induced another to change his situation; PARKE, B., in *Sheffield & Manchester Railway Company v. Woodcock*, 7 M. & W. 574, 583, *Pickard v. Sears*, 6 A. & E. 469, *Gregg v. Wells*, 10 A. & E. 90. In *Alchin v. Hopkins*, 1 New Ca. 99, 102, TINDAL, C. J., explained that the point established by *Good v. Cheesman*, was [*856] "that there has been a substitution of a new agreement, by mutual consent, and on good consideration, in the stead or place of the old contract." It is a *novatio debiti*, which extinguishes the old debt: and on this point, as is shown by Story, *Commentaries on the Law of Promissory Notes*, pp. 108, 538 (Boston, 1845), ss. 105, 438, the Roman law coincides in principle with the English. The question is, always, whether the parties intended by the new contract to extinguish the old. But here the new contract distinctly confines the suspension of the action to the time during which the annuity is paid. As, therefore, extinguishment is out of the question, and as a mere suspension cannot be pleaded in bar, the defendant's remedy is a cross action.

As to other cases which may be cited. In *Stracy v. The Bank of England*, 6 Bing. 754, S. C. 4 Moo. & P. 639, reported in Bingham, but more fully in Moore and Payne, the plaintiffs had, in effect, agreed to accept a new right of action in lieu of the original one, subject to a condition precedent; and this condition, which was in their own power, they had not performed, though they had received money in respect of the new contract: it was therefore held that the action did not lie. But in the present case there is no such substitution. The payment of the annuity by a third party will not prevent the Statute of limitations from

running; so that, if the payment fail at the end of six years, the remedy of the plaintiff will be destroyed, on the supposition that the payment suspends the right of action in the mean time. If *Stracy v. The Bank of England* decides that a right of action may be temporarily suspended *857] by an agreement not under seal, the decision *cannot be supported: and the last editor of Saunders's Reports appears to doubt whether it can be reconciled with other authorities; note (c) to *Fowell v. Forrest*, 2 Wms. Saund. 48 (6th ed.), note (c) to *Holdipp v. Otway*, 2 Wms. Saund. 108 b (6th ed.), note (i) to *Turner v. Davies*, 2 Wms. Saund. 150 a (6th ed.). It seems no such suspension can take place in the case of distress for rent; *Davis v. Gyde*, 2 A. & E. 628. In *Allies v. Probyn*, 2 C. M. & R. 408, 412, S. C. 5 Tyrwh. 1079, 1082, the Court of Exchequer appeared to think that in *Stracy v. The Bank of England* the new agreement satisfied the old one. *Tatlock v. Smith*, 6 Bing. 389, appears also to be placed, in note (i) to *Turner v. Davies*, among the questionable decisions. In *Longridge v. Dorville*, 5 B. & Ald. 117, the absolute abandonment of a doubtful claim was held to be a good consideration for a promise to pay money to the party abandoning: but, supposing that a promise of payment by a third party would be a good consideration for a promise to suspend a right of action, it does not follow that the contract can be pleaded in bar of the action.

The Court of Queen's Bench held, in *Snook v. Mattock*, 5 A. & E. 289, that, to scire facias for revival of a judgment, it could not be pleaded that a writ of error on the judgment was depending; *LITTLEDALE, J.*, saying, "I do not understand what is meant by a plea in temporary bar:" and they decided, in *Harris v. Reynolds*, 7 Q. B. 71, that the pendency of an arbitration could not be pleaded in bar to a declaration in assumpsit. In *Rayne v. Orton*, Cro. Eliz. 805, it *858] was held that a concord, executory in part, cannot be pleaded in bar. Accord is no bar without execution; *Allen v. Harris*, 1 Ld. Raym. 122, (a) Com. Dig. *Accord* (B 4), *James v. David*, 5 T. R. 141. The plaintiff might at any time refuse to accept the annuity; the tender would not then be a sufficient execution of the accord; *Peytoe's Case*, 9 Rep. 77 b, 79 b, relied upon in *Bayley v. Homan*, 8 New Ca. 915, 920. Here the case is even stronger, because the agreement is with a stranger. If judgment were given for the defendant on this record, it would estop the plaintiff from hereafter suing the defendant on the original cause of action if the stranger ceased to pay the annuity. A covenant not to sue at all may be pleaded in bar, to avoid circuity of action: but a covenant not to sue for a certain time cannot; *Thimbleby v. Barron*, 8 M. & W. 210. The reason is that in the latter case the two rights are not commensurate.

Unthank, contra. The defendant must of course succeed, if the effect of the agreement in the plea is, not merely to suspend, but to

(a) See *Carter v. Wormald*, 1 Exch. 81.

extinguish the original right of action. An agreement, *ex vi termini*, imports that there must be a consideration; which is the reason for holding that a memorandum of agreement under the Statute of Frauds, 29 C. 2, c. 8, s. 4, must show consideration. On general demurrer, it cannot be objected that a bargain and sale is pleaded without showing the consideration; *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259. Any circumstances may therefore be presumed here which would lead to a consideration *sufficient to support the agreement; as, for instance, that the plaintiff held the notes as trustee: at any rate, [*859 it is enough that the liability of a third party is introduced. Suspension of the remedy for a debt is a thing known to our law in many instances; for example, where a person becomes an alien enemy, or goes to reside in a hostile country. It is admitted, on the other side, that the right of action may be suspended by the acceptance of a mercantile instrument: why not, therefore, where the action itself, as here, is on such an instrument? In truth, the decisions in *Tatlock v. Smith*, 6 Bing. 389, *Good v. Cheesman*, 2 B. & Ad. 328, and *Simon v. Lloyd*, 2 C. M. & R. 187, S. C. 5 Tyr. 701, affirm generally the legality of a temporary suspension of right of action by agreement. [PARKE, B. I understand you now as not assuming the grant of the annuity to be an extinction of the debt to the plaintiff.] While performance goes on, the satisfaction operates. On default, it ceases, and the party is remitted to his rights. The satisfaction need not be actually executed, if there be promises to perform, and the party to whom promise is made has a remedy to compel performance; *Com. Dig. Accord* (B 4) (citing *Case v. Barber*, T. Ray. 450, S. C. 2 (T.) Jones, 158), *Cartwright v. Cooke*, 8 B. & Ad. 701. [PARKE, B. The last was a case in which parties had agreed to change the relation between themselves; one of two sureties had consented to become principal. MAULE, J. The action was for money paid, an equitable action; and the plaintiff's intestate had paid only what he had agreed on good consideration to pay.] *Payne v. Wilson*, 7 B. & C. 428, also *shows that the performance here bound [*860 the plaintiff for the time. If the present defendant were held liable, he would be entitled to recover back, under the agreement, the very sum he had paid. The contract here is not like a mere agreement that one party shall not sue another: its operation depends on the performance. *Tatlock v. Smith*, and *Good v. Cheesman*, already cited, were cases in which the suspension derived its effect from the introduction of third parties. In *Hyde v. Watts*, 12 M. & W. 254, the efficacy of the agreement rested on the same ground. [WILDE, C. J. That was the case of a defeasible release.] So is the present. [PARKE, B. There the event contemplated as defeating the release had happened before it was pleaded.] It had been a bar until the event happened. [PARKE, B. The case does not show what would have been the effect of the agreement if pleaded as a release before.] Another case of suspension

analogous in principle to the present is *Stracy v. The Bank of England*, 6 Bing. 754, where certain stockholders made claim against the Bank in respect of Long annuities transferred out of their names, as they alleged, by forgery: the Bank offered to replace the annuities if the complainants would prove for the value under a commission issued against a firm which was supposed liable to make it good: they consented to do so, and received money from the Bank (by agreement) on account of the dividends: and it was held that they could not sue the Bank for the value of the stock without having proved according to their promise. Lord *861] *ABINGER*, referring to that case, said, in *Allies v. *Probyn*, 2 Cro. M. & R. 411, S. C. 5 Tyr. 1081: "The agreement had been acted upon. The Bank of England had, by the conduct of a party, been put in a situation which could not be altered. They had allowed the stock to be transferred, and had paid over the proceeds to the party transferring. It was but fair that the owners of the stock should gain what they could from the estate of that party; and the Bank accordingly agreed, if they would do so, to guaranty the residue, without compelling them to bring an action. The agreement entered into was, therefore, perfectly fair. It did not operate as an extinction of the debt, but a suspension of the suit until a certain act was done by one of the parties. The plaintiffs, who assented to that suspension, received in return a complete satisfaction, because their debt was guarantied by the Bank. Here there was nothing but a simple engagement to execute a mortgage when called upon to do so. If they never called upon him, the defendant could never execute at all, and then the right of action would be suspended during their whole lives." In *Hodges v. Smith*, Cro. Elix. 623, it was pleaded, in bar to an action on a bond, that the plaintiff, by a subsequent indenture, granted to the defendant that, if he paid 100*l.* on such a day, the obligation should be void; and defendant did so pay: and it was held that this might be pleaded, instead of suing on the covenant, to avoid circuitry of action. The cases in which it has been decided that a creditor giving time to a principal debtor releases the surety prove that the creditor may so give time, and is bound by having done so. The present plea is good according to each class of authorities.

*862] **Pashley*, in reply. In *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259, the question was merely how advantage should be taken of the defective setting forth of a title. In *Simon v. Lloyd*, 2 Cro. M. & R. 187, S. C. 5 Tyr. 701, the efficacy of the instrument was disputed only on the ground of its incompleteness, the case being distinguished, in that respect, from *Kearslake v. Morgan*, 5 T. R. 513; and leave was given to amend. The effect of *Tatlock v. Smith*, 6 Bing. 339, was that one creditor, who with others had consented to an arrangement placing the funds of their debtor in the hands of trustees for distribution, could not change the condition of the other creditors again by bringing an action on his own account. The original debt was for

the time gone, and a new one constituted. Bracton, ff. 100 *b*, 101 *a*, B. 3, c. 2, § 13, in considering "*quibus modis tollitur obligatio*," says. "*Item per novationem, ut si transfusa sit obligatio, de unâ personâ in aliam, quæ in se suscepit obligationem : Interventu enim novæ personæ nova nascitur obligatio, et prima tollitur.*" And in the Digest, Lib. 46, tit. 2, § 1, after defining "*novatio*" (which is said to be so called, "*a novâ obligatione*"), it is added: "*Hoc est, cum ex præcedenti causâ ita nova constituatur, ut prior perimatur.*" This is the principle on which *Tatlock v. Smith* turns. The subject is considered by Sir W. D. Evans in a note to his translation of Pothier on Obligations, vol. i. p. 380 (Part 3, c. 2, art. 1), note (a). The principle on which covenants not to sue have been held equivalent to a release is merely the expediency of avoiding circuity of action; *Walmesley v. Cooper*, 11 A. & E. 216, 221; **Hutton v. Eyre*, 6 Taunt. 289, 294. (a) The ground of decision in *Cartwright v. Cooke*, 3 B. & Ad. 701, was the im- [*868]mediate remedy each party had to compel performance: here the same circumstance is not found. *Case v. Barber*, T. Raym. 450, S. C. 2 (T.) Jones, 158, was decided on the Statute of Frauds; the statement in *T. Jones*, that accord without execution may be pleaded, is no part of the judgment of the Court. [MAULE, J. Clearly it is an extrajudicial dictum. I think the contrary was decided a few years afterwards on demurrer.] *Peytoe's Case*, 9 Rep. 77 *b*, 79 *b*, has never been questioned on this point. *Payne v. Wilson*, 7 B. & C. 423, does not bear on this case: there the agreement to suspend was not pleaded in bar, but was declared on as the consideration for defendant's promise; and the declaration averred the suspenson. In *Allies v. Probyn*, 2 Cro. M. & R. 408, S. C. 5 Tyr. 1079, the plea failed, as showing only accord without satisfaction. The suspension of remedy by the taking of a promissory note was recognised by the Supreme Court of New York in *Holmes & Drake v. D'Camp*, 1 Johnson's Rep. 84, 86, where it is spoken of as "*an extinguishment sub modo.*" In *Pintard v. Tackington*, 10 Johns. 104, in the same Court, acceptance of such note was said to be *prima facie* evidence of satisfaction; the Court adding: "*you cannot recover upon the old debt without some explanation, or giving some account of the note.*" Instances of the constitution of a new debt, where one partner has retired and the plaintiff has dealt with a new firm, have frequently been recognised: as in **Thompson v. Percival*, 5 B. & Ad. 925, and *Hart v. Alexander*, 2 M. & W. 484, which were cited as [*864] authority by WIGRAM, V. C., in *Benson v. Hadfield*, 4 Hare, 32, 37. [PARKE, B. Those are cases in which a new party is adopted as debtor.] *Cur. adv. vult.*

PARKE, B., in this vacation (February 3d), delivered the judgment of the Court.

This is a writ of error brought to reverse a judgment of her Majesty's

(a) See *Connop v. Levy*, *antâ*, p. 769.

Court of Queen's Bench. The declaration is in assumpsit, and contained five counts. The first count is upon a promissory note, dated 28th May, 1839, made by the defendant, for the sum of 140*l.* and interest, payable to the plaintiff twelve months after date; the second count is also on a promissory note, made by the defendant, for the sum of 200*l.*, payable with interest to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant; and no question arises in respect of that judgment.

The defendant pleaded, to the first count, that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively mentioned, and after the same notes respectively became due, it was agreed, between the plaintiff, the defendant, and one Alfred Beech, *865] *that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of 200*l.* for her own sole use and benefit, or the sum of 25*l.* per annum so long as the sum of 200*l.* should remain unpaid, which sum of 25*l.* should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended so long as the said A. B. should continue to pay the said sum of 6*l.* 5*s.* every quarter; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of 25*l.* quarterly according to the agreement. The plaintiff, in his replication to this plea, traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of 25*l.*; and a verdict was found for the defendant upon the issue joined upon that traverse. And judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, non obstante veredicto upon the matters in that plea, judgment ought to have been given for the plaintiff upon both the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not *866] denied: but *it has been insisted, in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration; and

that the plea, which sets up the agreement in bar of the present action, is bad, and furnishes no answer to the action, although such agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and such agreement has therefore been well pleaded in bar. The question for the decision of the Court is, therefore, what is the legal effect of the agreement between the parties, set forth in the plea: that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments; or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And, *ap- [867
plying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well-established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in *Platt v. The Sheriffs of London*, Plowd. 35, 36: "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge for ever." And in *Lord North v. Butts*, 2 Dyer, 139 b, 140 a (39), it is said: "a thing personal or suspended, or action personal suspended for an hour, is extinct and gone for ever, when it is by the act and consent of the party himself who has the thing suspended." And in *Woodward v. Lord Darcy*, Plowd. 184, it is said: "for a personal action once suspended by the act or agreement of the party is always extinct, and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is

*868] repeated throughout the text books of authority, and recognised and applied through a long course of decision. And in *Cheetham v. Ward*, 1 Bos. & P. 680, 683, it is said by Lord Chief Justice EYRE that the principle is "now acknowledged, that where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word *suspended*, used in the agreement, would be contrary to the intention of the parties: and it is a well approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction.

A few authorities will suffice in support of this principle. In commenting upon Littleton, sect. 560—wherein Littleton says, "If there be lord and tenant, and the tenant grant the tenements to a man for term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee," "the services are put in suspence during his life. But the heirs of the tenant for life shall have the services after his decease."—Lord Coke, in 813 a, says: "It is to be observed, that albeit a grant, as hath been said, may enure by way of release, and a release to *869] the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties as here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disherited of the rent; and therefore Littleton here saith, that the heirs of the grantee shall have the seigniori after his death." In the present case, if the agreement operates as a release by reason of a suspension of the right of action by the act of the party, it must be by a consequence of law, inasmuch as there is no express release: and in *Co. Litt.* 264 b, it is said: "a release in law shall be expounded more favourable, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself." The general rules of law for the construction of instruments are clearly laid down by WILLES, C. J., in *Parkhurst v. Smith*, lessee of Dormer, Willes, 827, 832, and which is to the effect that greater regard is to be had to the intention than to the precise words; and this rule is said to have the authority of Littleton, Plowden, Coke, Hobart, and Finch. This principle is recognised and adopted by GIBBS, C. J., in *Hutton v. Eyre*, 6 Taunt. 289, 295, 6, & C.

1 Marsh. 608, 607, 8 : and it is also stated and applied by DALLAS, C. J., and various authorities referred to, in *Solly v. Forbes*, 2 Br. & B. 38, 48 ; wherein he states, as the result of modern authority, that the courts look "rather to the intention of the parties than to the strict letter ; not suffering the latter to defeat the *former ;" and he observes [*870 that, if a deed can "operate two ways, one consistent with the intent and the other repugnant to it, courts will be ever astute so to construe it as to give effect to the intent," regard being had to "the entire deed : " and remarks upon the fallacy of assuming that, "wherever the word release is made use of, it must operate absolutely and unconditionally," though followed by words of qualification.

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made ; and that the effect of such agreement on his part was, not to suspend his right of action in the mean time, but to subject him to an action for damages in the event of his suing contrary to his agreement.

The general doctrine of suspension of personal actions appears to be applicable to cases where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies ; the cases generally referred to in the books being where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be ; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue : as to which the authorities are numerous ; see Co. Litt. 264 b, also Butler's note ib. (209), *Woodward v. Lord Darcy*, Plowd. 184, *Sir *J. Nedham's Case*, 8 Rep. 185 a, [*871 *Dorchester v. Webb*, Cro. Car. 372, *Wankford v. Wankford*, 1 Salk. 299, *Freakley v. Fox*, 9 B. & C. 130, 2 Williams on Executors, 1124, ed. 4.

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release, note (1) to *Fowell v. Forrest*, 2 Wms. Saund. 47 gg, for the reason assigned, that the damages to be recovered in an action brought for suing contrary to the covenant would be equal to the debt (*Smith v. Mapleback*, 1 T. R. 441, 446), or sum to be recovered in the action agreed to be forborne. Accordingly, in *Deux v. Jefferies*, Cro. Eliz. 352, in debt on obligation, the defendant pleads that the plaintiff covenanted that he would not sue before Michaelmas : it was resolved, upon demurrer, for the plaintiff, for that it was only a covenant not to

sue, and should not enure as a release, nor could be pleaded in bar, but the party was put to his writ of covenant, if sued before the time. "But if it had been a covenant that he would not sue it at all, there peradventure it might enure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release." And there are other authorities to the like effect. The agreement in the present case, though not under seal, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but

*872] cannot have *a greater effect: and, in the modern case of *Thimbleby v. Barron*, 3 M. & W. 210, it was held that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not, before the expiration of ten years, demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord ABINGER, C. B., said: "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar:" and PARKE, B., said: "The books are full of authorities" against the defendant, and referred (3 M. & W. 215) to *Ayloff v. Scrimshire*, Carth. 63, S. C. 1 Show. 46: judgment for plaintiff. In 1 Roll. Abr. 989, tit. *Extinguishment* (L), pl. 2, it is said that, if the obligee covenant not to sue the obligor before such a day, and, if he do, that the obligor shall plead this as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release. It must be observed that in that case it was expressly covenanted that, in the event of the covenantor suing upon the obligation contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release: the covenant in that case therefore went much beyond a mere covenant not to sue.(a)

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but, by construing the agreement not to *873] *operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross action to recover damages to the extent of the injury sustained by the defendant by the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions; *Smith v. Mapleback*, 1 T. R. 441, 446; which does not apply to the present instance, as the damages to which the

(a) See also the conclusion of *Ayloff v. Scrimshire*, Carth. 64.

defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand.

Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonoured, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favour of the law merchant; see note (c) to *Holdipp v. Otway*, 2 Wms. Saund, 103 b, (6th ed.)

*The case of *Stracy v. The Bank of England*, 6 Bing. 754, [874 was cited, on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment. But, upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock, to which the plaintiffs were entitled; the defendants insisted that the plaintiffs had for good consideration agreed not to make such request until they had themselves done certain acts; and alleged that the plaintiffs, contrary to their agreement, made the request, for the non-compliance with which they brought their action, before they had done those acts: the defendants therefore contended that such non-compliance was no breach of duty on their part. There was no right of action suspended by the agreement; as it is clear from the case that no request had ever been made to the Bank to transfer the stock, and no means had ever been given to enable the Bank to do so, no name of a transferee having been given at the time when the agreement was made, nor for a long time afterwards: consequently, the only right of action the plaintiffs ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was, not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendants to make a transfer until after he had done the acts mentioned in the agreement. And, although the expression of *suspending an action was used, perhaps inaccurately, yet it is plain that they referred to the right to call for the transfer of the [875 stock, and to that only. At all events, as a decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent with an undoubted principle of law and an undeviating course of authority.

In the result, we are of opinion that the plea in question is bad in

substance, and that the judgment which has been pronounced upon it in favour of the defendant must be reversed, and a judgment entered for the plaintiff, non obstante veredicto, upon the confession and insufficient avoidance in the plea.

Judgment accordingly.

END OF HILARY VACATION

CASES
ARGUED AND DETERMINED
IN
THE QUEEN'S BENCH,
IN
Easter Term and Vacation,
XI. VICTORIA.

THE Judges who usually sat in Banc in this Term and Vacation were,
Lord DENMAN, C. J. WIGHTMAN, J.
PATTESON, J. ERLE, J.

REGULA GENERALIS.

The following rule was read in Court on May 2d in this term.

IT IS ORDERED that no Subpoena duces tecum be issued for enforcing the production of any record of the acts of any Court, deposited in the Public Record Office pursuant to the statute 1 & 2 Victoria, c. 94, or any other document or minute of proceedings officially filed of record in any Court, and deposited in the Public Record Office pursuant to the said Statute, without an Order of the Court out of which the said Subpoena shall issue, or of some Judge thereof.

DENMAN.	T. COLTMAN.
THO. WILDE.	R. M. ROLFE.
FRED. POLLOCK.	WM. WIGHTMAN.
J. PARKE.	T. J. PLATT.
J. PATTESON.	

*The QUEEN v. The Inhabitants of the Tithing of [*877
EAST MARK. *April* 17.

On the trial of an indictment, for non-repair of a road, against a tithing, bound by custom to repair all public roads therein, it appeared that the road had formed part of the waste of a manor, and had been set out as a private road by award of commissioners under a private

enclosure act, and had been used by the public generally ever since it had been so set out. A portion of the waste had been allotted to the lord (as the act directed) in respect of his interest in the soil.

After verdict for the Crown, it was argued, for the defendants, on motion to enter a verdict for them, that the soil of the road had been taken from the lord, and transferred to no other person, and therefore there was no owner, or none against whom a dedication to the public could be presumed; and that, if the Crown were the owner, the jury should have been directed that stronger evidence was necessary to raise a presumption of dedication than if the owner had been a private person.

Held, that dedication might be presumed against the Crown from long acquiescence in public user; and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that a dedication to the public was intended.

INDICTMENT for non-repair of a road. The indictment alleged that the inhabitants of the tithing had been immemorially used, &c., to repair all common highways within the tithing, which, but for such usage, &c.; and that the road in question was such a highway. Plea, Not Guilty. Issue thereon.

On the trial, before WILLIAMS, J., at the Somersetshire Spring assizes, 1847, it appeared that the road in question had been set out as a private road by Commissioners appointed under stat. 34 G. 3, c. 15 (Private), "for dividing, allotting, and enclosing certain moors, commons, or waste lands, called Little Mark Moor and Summer Lease, and all the other open, common, or waste lands in the manor of East Mark, within the parish of Mark, in the county of Somerset." Sect. 11 authorized the commissioners to extinguish all rights of common over the lands to be enclosed under the act. Sect. 13 authorized the commissioners to set out both public and private roads on and by the sides of the lands to be *878] divided and allotted; the public roads to be *repaired in such manner as other public roads are directed to be repaired by the laws of the realm; the private roads to be repaired by such persons and in such manner as the commissioners should award: the grass and herbage growing upon any of the public and private roads to be set out to be and for ever remain to and for the use and benefit of such persons as the commissioners by their award should appoint. Section 14 enacted: "That after the said Commissioners shall have set out and allotted the several and respective parts and parcels of the said moors, commons, or waste lands, for the purposes aforesaid, they the said commissioners shall, and they are hereby authorized and required to set out, allot, enclose, and award to and for" Michael Hicks Beach, "as lord or owner of the soil of the said moors, commons, or waste lands, in respect of his right and interest in the said soil in the said moors, commons, or waste lands, such certain parts or parcels thereof as to the said commissioners shall seem meet, so that such parts or parcels, so to be allotted and set out to the said lord of the said soil be not more than one twentieth part of the remaining parts of the said moors, commons, or waste lands (quality, situation, and convenience considered)." Section 17 authorized the commissioners to allot "all the residue and remainder of the said moors,

commons, or waste lands unto, for, and amongst every person or persons, proprietor and proprietors interested therein, in respect of their several and respective rights in, over, and upon the same." Section 28 provided "that nothing in this act shall prejudice, lessen, or defeat the right, title, or interest of" M. H. B., "as lord of the said manor of East Mark, or any future lord or lords of the said manor, *in and to the seignories, royalties, rights and services belonging thereto, but the said" [*879 M. H. B., "and all future lords," &c., "shall and may, from time to time, and at all times for ever hereafter hold and enjoy all mines, minerals, goods, and chattels of felons and fugitives, felons of themselves, and persons put in exigent, deodands, waifs, estrays, forfeitures, and all other rights, royalties, jurisdictions, and pre-eminences whatsoever to the said manor appendant or appertaining (other than and except such for which compensation is directed to be made by this act), in as full, ample, and beneficial manner as he and they could or might have held and enjoyed the same, in case this act had not been made." The last section also saved to the Crown, and to all persons and bodies politic and corporate, &c., "(other than and except the several persons to whom any allotment or allotments shall be made, and whose rights are intended to be hereby barred and extinguished) all such estates, rights, title, interest, claim, and demand, which they, any, or every of them had and enjoyed of, in, to, or out of the said moors, commons, or waste lands, so intended to be divided and enclosed, or exchanged as aforesaid, at the time of passing this act, or could or might have held and enjoyed in case the same had not been made."

The award, dated January 4th, 1797, extinguished rights of common over the moor; and, after setting out the road in question and other roads as private roads, directed that the said private roads should be kept in repair by the inhabitants of the tithing, and that the grass and herbage growing and renewing upon them should be and remain for ever for the use and benefit of the respective owners and occupiers for the *time being adjoining to such roads. Besides the other allotments directed by the act, the award made an allotment to the [*880 lord of the manor "as lord or owner of the soil of the said moors, commons, or waste lands in respect of his right and interest in the said soil in the said moors," &c., "and to and for the future lord or lords of the said manor of East Mark." It was conceded that so much of this award as imposed the liability to repair the private roads upon the inhabitants was illegal, because the inhabitants derived no benefit from the enclosure.

Evidence was given of an immemorial custom to repair, as alleged in the indictment; and also that the road in question had been used by the public generally ever since it had been set out.

For the defendants it was contended that there was no evidence of dedication, inasmuch as the interest in the soil had been taken out of

the lord by force of the allotment made to him in lieu of such interest ; and that there was no owner, or, at all events, no owner by whom the dedication could have been made. *Poole v. Huskinson*, 11 M. & W. 827, was cited in answer, where PARKE, B., observes, in his judgment : " As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others." The learned Judge, after adopting the language of PARKE, B., in the same case, that, " In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *881] *animus dedicandi*, of which the user by the public is *evidence*, and no more," added that there could not be land without an owner ; that, if the dictum of PARKE, B., were correct, the ownership remained in the lord ; but that, at all events, it must be in somebody ; and that it was for the jury to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. Verdict for the Crown ; leave being given to move to enter the verdict for the defendants.

Cockburn, in Easter term last, obtained a rule nisi accordingly. He cited *Barraclough v. Johnson*, 8 A. & E. 99, *Rex v. Edmonton*, 1 M. & Rob. 24, and *Harper v. Charlesworth*, 4 B. & C. 574 ; and contended that the learned Judge had directed the jury, on the authority of *Poole v. Huskinson*, that the ownership of the soil was in the lord, whereas the award had taken it from him ; and that the jury ought to have been directed that, if the ownership were in the Crown, much stronger evidence would be necessary to raise a presumption of dedication than if the ownership were in a private person.

Kinglake, Serjt., and *Fitzherbert* now showed cause. There is no ground for entering a verdict for the defendants. The learned Judge did not state that the soil remained in the lord ; but, passing by any question as to the ownership of the soil, directed the jury to consider whether the owner, whoever he might be, had dedicated the road to the *882] public. This direction was *correct, whether the lord or the Crown was the owner. But the lord was the owner ; for so much only is taken from him as is allotted to others ; *Poole v. Huskinson*.

Cockburn and *Barstow*, contra. The learned Judge was understood to direct the jury expressly, on the authority of *Poole v. Huskinson*, that the lord continued to be owner of the soil. But the statute clearly divested him of all interest in the soil ; he is to have a certain portion of the soil in lieu of the whole ; the express saving of his interest in the minerals by the act favours this construction. To whom then did the soil belong ? Perhaps to no one ; *Rex v. Edmonton* seems to show that such a state of things is possible. At all events, to support this verdict, it is not suffi-

cient that there was some owner; there must have been an owner who knew that he was so, or his consent to the public user cannot be presumed. And the jury should have been directed that much stronger evidence of dedication would be necessary as against the Crown than as against the lord, who is likely to be present in the neighbourhood, and to be cognisant of his rights and of any invasion of them.

LORD DENMAN, C. J. The law, as lately laid down, has led the Courts into very inconvenient inquiries. If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I know who has been the owner of it? The Crown certainly may dedicate a road to the public, and *be bound by long acquiescence in public user. I think the public are not bound to inquire whether [883 this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible. The direction of the learned Judge seems quite right; he evidently stopped short of any inquiry as to the ownership of the soil.

PATTESON, J. The direction was quite right. There may be a dedication by the Crown; and I think in these cases we ought not to inquire very nicely into the ownership of the soil or into the evidence of any precise intention to dedicate. If property is under lease, of course there can be no dedication by the lessee, to bind the freehold. My brother WILLIAMS did not lay it down that the soil did belong to the lord; and I think it is quite unnecessary that we should now inquire to whom it belonged.

WIGHTMAN, J. The direction was quite right. The fallacy has been occasioned by the reference to *Poole v. Huskinson*, where it was held that the soil was in the lord. The learned Judge merely referred to that decision as showing what might be the case; but, if the whole of the summing up is looked at, it is clear that he did not state that the soil was in the lord; and he expressly left it to the jury to say whether the owner, whoever he might be, intended to dedicate.

*ERLE, J. In this case there was uninterrupted user of the [884 road by the public for about fifty years. I think the learned Judge would have been quite justified in telling the jury that, although there must be an intention on the part of the owner to dedicate, such user was so strong an evidence of his intention that the jury ought to find in favour of the dedication, unless there was some evidence that he did not consent. The direction was much more favourable to the defendants than that would have been.

Rule discharged.(a)

(a) Reported by H. Davison, Esq.

DOE, on the several demises of JOHN Earl of SHREWSBURY and of JAMES HURD ALLEN, v. THOMAS KEELING. *April 19.*

On the trial of an ejectment, in order to account for an apparently adverse possession by defendant, the lessor of plaintiff proposed to prove that defendant had held under a lease granted by a party through whom lessor of plaintiff claimed, dated seventy years back, which had expired three years back. The lease was offered in evidence; and it appeared that it had been seen in the hands of the land agent of the lessor of the plaintiff, that the agent was in the assize town the day before the trial, but had left it and had not yet returned; and that his bag was cut open in court, and the lease taken from it, by the plaintiff's attorney. The Judge having rejected the evidence, and nonsuited the plaintiff,

Held that the evidence ought to have been received: and a new trial was granted.

EJECTMENT for messuages and lands in Staffordshire. On the trial, before PATTESON, J., at the last Staffordshire Assizes, it appeared that John Earl of Shrewsbury, the first lessor of the plaintiff, claimed through George, late Earl of Shrewsbury; and that the defendant held as tenant to his father, Thomas Keeling the elder, who had been in possession for more than forty years. The plaintiff's counsel proposed to meet this by *885] proving that Keeling, the father, held *under a lease granted by Earl George in 1776 for ninety-nine years, determinable upon three lives, to John Smith, who had assigned to Keeling, the father, and Allen, the second lessor of the plaintiff, in 1800; and that the last of the lives expired in 1845. Allen now claimed under a later lease from the first lessor of the plaintiff. The lease of 1776 was produced by the attorney for the plaintiff, who said that he had seen it in the custody of Thomas Ward, land agent to the present Earl of Shrewsbury: that Ward was in the assize town on the day before the trial, but had left it, and had not returned: and that he, the attorney, had taken it from Ward's carpet bag, having cut the bag open in court for the purpose. It appeared to be executed by Earl George only. The learned Judge, on objection, refused to receive the evidence. The counsel for the plaintiff then tendered in evidence the assignment of the lease, which had been taken from Ward's bag in the same way and at the same time, and proposed, if necessary, to put this into the hands of Allen, the second lessor of the plaintiff and assignee of the lease, who was then in court, and take it back from him. The learned Judge, however, thought that it could not be made admissible. The plaintiff was nonsuited.

Tatford, Serjt., now moved for and obtained a rule nisi for a new trial on the ground of the rejection of evidence. On a later day in this term, (a)

Whateley and Greaves showed cause. The lease of 1776 was not shown to come from the proper custody. The rule as to proving that *886] ancient documents come *from the proper hands is laid down in 1 Stark. Ev. 882, &c. (8d ed.), *Chelsea Water-Works' Company v. Cowper*, 1 Esp. N. P. C. 275, *Swinnerton v. Marquis of Stafford*, 3

Taunt. 91, at nisi prius, before LAWRENCE, J. (who relied on a case of *Michell v. Rabbetts* (a)), and Doe dem. *Neale v. Samples*, 8 A. & E. 151. It has never been decided that the attorney of the party entitled to the custody of the lease represents the party in this respect. No reason was given for the absence of Ward: had he been examined, he would have stated whether he had held the lease for the lessor of the plaintiff or for some third party. The attorney here did not even produce in his character of attorney: and Ward, for anything that appeared, had no right whatever in which he could keep the document: he was no more than agent of the lessor of the plaintiff for receiving rents. *Evans v. Rees*, 10 A. & E. 151, shows that it is not enough that a manor book be produced in Court by the counsel for the lord of the manor, or his steward, or the lord himself, (b) but that there must be a sworn witness. A deed, sworn to come from the custody of the attorney of the party beneficially interested in the premises to which it related, was admitted in Doe dem. *Jacobs v. Phillips*, 8 Q. B. 158: but there it also appeared that the attorney acted generally for the family of such party. Here, if it had appeared that either the attorney or Ward kept the other deeds of the lessor of the plaintiff, the objection might not have arisen. Or it might have been removed by evidence of acting with reference to the document, *which evidence should always be given unless the antiquity of the document prevents it; 1 Phil. Ev. 277 (9th ed.), [*887 *Clarkson v. Woodhouse*, 3 Doug. 189: (c) the importance of such evidence appears from *Barnes v. Mawson*, 1 M. & S. 77, and *Manby v. Curtis*, 1 Price, 225. (d) *Randolph v. Gordon*, 5 Price, 312, shows the necessity of accounting for the possession of ancient books.

As to the assignment: the parties entitled to the custody were the assignees, Keeling, the defendant's father, and Allen, one of the lessors of the plaintiff. Ward could not be the proper person to have the custody. Keeling, the father, might have been called.

Talfourd, Serjt., and *Whitmore*, contra. As to the lease of 1776. The true principle is laid down, in Doe dem. *Jacobs v. Phillips*, 8 Q. B. 158, by COLERIDGE, J., who says: "Evidence of the custody from which a deed thirty years old comes is given, not as a ground for reading the instrument for or against a party, but only to afford the Judge reasonable assurance of its authenticity." There was such assurance here. The questions on this point have ordinarily arisen where the document has been the property, either of the public, or of some person other than the parties to the cause. But, when the document belongs to a party in the cause, it cannot signify whether the document is brought from his muniment room, or produced from his pocket, or from the hands of his agent, attorney, or counsel. In Doe dem. *Jacobs v. Phillips*,

(a) Not reported.

(b) Admitted, in that case, to be the real, though not the formal plaintiff.

(c) S. C. note (a) to *Bateson v. Green*, 5 T. R. 412.

(d) As to this case, see *Bertie v. Beaumont*, 2 Price, 303, 308.

*888] PATTERSON, J., said: "It would be most inconvenient, if, *in cases where a deed is produced by the party's attorney, inquiries were to be made how and where he got it." There can, in principle, be no difference between this case and that of an unexpired lease thirty years old: yet in the latter instance it is never thought necessary to inquire, if it is produced on the part of the lessor, where he kept it. "In ordinary cases," "where the instrument is produced by one who has an interest in it, it is not necessary to show where the instrument has been kept;" 1 Stark. Ev. 383 (3d ed.); and, again, "in some instances the party who offers the instrument in evidence is the proper depository, and then no proof of custody is necessary;" ib. 386. This rule sufficiently appears from *Rex v. Ryton*, 5 T. R. 259, and *Rex v. Netherthong*, 2 M. & S. 337. Now the party entitled to the custody of an expired lease is the reversioner; *Plaxton v. Dare*, 5 Mann. & R. 1, S. C. 10 B. & C. 17:(a) therefore the lessor of the plaintiff, Lord Shrewsbury, is a party in the situation contemplated by Mr. Starkie.

As to the assignment: in strictness the custody should be that of the assignees, that is, of Allen and Keeling. Allen took the custody in court: the fact that it had previously been in the custody of Lord Shrewsbury's agent did not make this the less fit. If Allen's was not the fit custody, then the document was admissible as coming from the custody of Lord Shrewsbury's agent. Or, supposing that the assignor was the proper depository after the lease had expired, the assignee might still keep it till claimed: and this was enough to satisfy the Judge of the authenticity.

*889] *Lord DENMAN, C. J. Cases of this sort are peculiar, because the judge is in the situation of a jury: and, where perhaps we might not agree with his decision, we often say that we will not interfere. In this case, however, I own that I should have had no doubt in receiving the evidence. Most of the reported cases are decisions in favour of receiving documents, on the ground that they have come from proper custody: and the Courts ought, I think, to be liberal in this respect. Then, secondly, comes the question whether the learned Judge was here so far wrong that we ought to set aside his ruling. In *Rees v. Walters*, 8 M. & W. 527, 531, PARKE, B., said: "I rather think it is for the Judge to say whether a document is produced from the proper custody or not, and we cannot interfere unless we think it wrong." In *Doe d. Jacobs v. Phillips*, 8 Q. B. 158,(b) we did set aside a decision of my brother PARKE, thinking him wrong. Acting on that, I think we are bound to say here that my learned Brother was wrong, and to make the rule absolute: the preponderance of authority was greatly in favour of admitting the evidence.

(a) Where, however, the point is not noticed: nor does it appear, by either report, to have been expressly adverted to at the bar or by the Court.

(b) See *Regina v. Kenilworth*, 7 Q. B. 642.

WIGHTMAN, J. I am entirely of the same opinion. Since *Plaxton v. Dare*, 5 Man. & R. 1, it has been understood that the proper custody of an expired lease is that of the lessor, and that it may be produced by him. Here the lease of 1776 comes, not indeed from the direct custody of Lord Shrewsbury, but from that of a person who represents him as to the property in question. The case therefore is directly within the rule, that *documents are admissible which are found in a place [890 in which, or in the hands of a person with whom, they might be expected to be found. It is not necessary that it should be the most proper custody; for then no question would arise: the cases discussed have been those in which the custody has been other than that which was strictly the most proper.(a) Here the lease is found in the custody of the agents, which appears to me quite sufficient.

PATTERSON, J. I think I acted too strictly in refusing this evidence. I thought I saw danger in admitting it: but I am now of opinion that I was mistaken.(b) Rule absolute.

(a) See *Bishop of Meath v. Marquess of Winchester*, 3 New Ca. 183, 200; *Doe dem. Neale v. Samples*, 8 A. & E. 151.

(b) *EALE, J.*, was absent.

DAVISON v. WILSON and Others. May 5.

Declaration stated that defendants with force and arms, and with a strong hand and against the form of the statute in such cases, &c., broke and entered plaintiff's dwelling-house then in his actual occupation, made a noise and disturbance therein, and stayed therein making such disturbance, &c., and in a forcible manner and with a strong hand broke open the doors, broke the locks, &c., and with force and arms, &c., assaulted plaintiff, and in a forcible manner and with a strong hand expelled him, &c.

Plea: Not Guilty: and, as to the breaking and entering, &c., making a noise, &c., and staying, &c., and breaking open the doors, &c., "as in the declaration mentioned," that the dwelling-house, &c., was the dwelling-house, soil, and freehold of one defendant, wherefore he in his own right, and the others as his servants, &c., at the time when, &c., broke and entered, &c., and committed the supposed trespasses.

On special demurrer to the last plea: Held

(Assuming the averments in the count to be indivisible, and that all must be answered by the plea): That the plea answered every material part of the declaration, the averments "with force and arms," "with a strong hand," and "against the form of the statute," being, on these pleadings, matter of aggravation only.

Quære, whether an entry by force and in breach of the peace, when those circumstances are material, can be justified by showing that the defendant was entitled to the premises, and the plaintiff an intruder.

TRESPASS. The declaration stated that the defendants, on, &c., "with force and arms, &c., and with a strong hand, and against the form of the statute *in such case made and provided, broke and entered a certain dwelling-house, messuage, and cottage of the plaintiff, then being in the actual occupation and possession of the plaintiff, and situate and being in the parish," &c., "and made a great noise and disturbance therein, and stayed and continued therein making such noise," &c., "for a long time, to wit," &c., "and then, in a forcible [891

manner and with a strong hand, forced, broke open, broke to pieces and damaged divers, to wit, two doors and two windows of the plaintiff of and belonging to the said dwelling-house, and broke to pieces," &c., "divers, to wit, ten locks," &c., "and ten window fastenings of the plaintiff, then belonging to and being in and upon the said doors and windows respectively of the said dwelling-house, and wherewith the same were then fastened, and of great value, to wit," &c.: "and then also with force and arms, &c., assaulted the plaintiff, and beat" him, "and pushed, pulled, and dragged him out of his said dwelling-house, and in a forcible manner and with a strong hand put out, disseised, dispossessed, and expelled the plaintiff therefrom for a long space of time, to wit," &c. By means of which said several premises the plaintiff and his family were, during all the time aforesaid, not only greatly disturbed, &c., in the peaceable possession, &c., but the plaintiff was also, during all the time aforesaid, hindered, &c., from carrying on therein his business, &c. "And other wrongs," &c., "against the peace," &c., "and against the form of the statute," &c.

Pleas: 1. Not guilty. Issue thereon. 2. "As to the breaking and entering the said dwelling-house, messuage, and cottage, and making a *892] noise," &c., "therein, and staying," &c., therein, "making such *noise," &c., "for the space of time in the declaration mentioned, and forcing, breaking open," &c., "the said doors," &c., "and breaking to pieces," &c., "the said locks," &c., "and window fastenings, as in the declaration mentioned," that the said dwelling-house, &c., in which, &c., and the said doors, &c., were not, &c. (denial of plaintiff's ownership), in manner and form, &c. Conclusion to the country. Issue thereon.

3. As to the trespasses in the introductory part of the second plea mentioned: that the said dwelling-house, messuage, &c., in which, &c., at the said time when, &c., was and now is the dwelling-house, &c., soil, and freehold of the defendant Richard Wilson: wherefore the said R. Wilson in his own right, and the other defendants as the servants and by the command of the said R. Wilson, at the said time when, &c., broke and entered, &c., and committed the said supposed trespasses in the introductory part, &c., mentioned, as they lawfully, &c. Verification.

Demurrer to plea 3, assigning for causes: That the third plea contains no answer in law to the trespasses in the introductory part of that plea mentioned, &c., in this, to wit, that it appears by the declaration that the said last-mentioned trespasses were committed by the defendants under circumstances which, in point of law, amounted to a forcible entry within the meaning of the statutes relating to forcible entries, and consequently a plea of liberum tenementum affords no answer to the said trespasses: and also that a freeholder is not justified in taking possession of his freehold unless he can do so without committing a breach of the peace; whereas it appears by the declaration that the trespasses

committed by the defendants in endeavouring to *regain possession of the freehold were such as rendered the defendants guilty [*898 of an indictable offence: and also that it appears by the declaration that the plaintiff was in actual occupation and possession of the dwelling house at the time the trespasses were committed.

Joinder in demurrer.

Hunter, for the plaintiff. This demurrer raises the question, discussed in *Newton v. Harland*, 1 Man. & G. 644, whether the owner of premises can justify entering by force upon a person who is wrongfully occupying them. [ERLE, J. The plea is not pleaded to the entering "with a strong hand, and against the form of the statute." Lord DENMAN, C. J. The defendant appears to deny this part of the charge by his plea of Not guilty, and may probably contend that it is not included in the justification.]

The Court offered *Cowling* (who supported the plea) permission to amend, in order that any difficulty on this point might be avoided: but he declined doing so; and *Hunter* was directed to proceed.

The decision of a majority of Judges in *Newton v. Harland* is against the present justification. An opinion contrary to that judgment of the Court of Common Pleas was expressed by PARKER and ALDERSON, Bs., in *Harvey v. Brydges*, 14 M. & W. 487,^(a) but extrajudicially. *Hillary v. Gay*, 6 Car. & P. 284, relied upon in *Newton v. Harland*, is also an authority for the plaintiff. The *cases cited in *Newton v. Harland* by COLTMAN, J. (the dissentient Judge), and by counsel for [*894 the defendants, are not conclusive. In *Turner v. Meymott*, 1 Bing. 158, S. C. 7 B. Moore, 574, where the landlord's entry was held justifiable, the house was empty. [PATTERSON, J. DALLAS, C. J., there^(b) says generally: "The plaintiff had ceased to be tenant to the defendant; and it would be going a great length to say, that he could bring an action of trespass against him for entering his own house. If the plaintiff has any remedy, he may try it by an indictment for a forcible entry." And he refers to the language of Lord KENYON in *Taunton v. Costar*, 7 T. R. 481, which is nearly to the same effect.] In Yearb. Trin. 9 H. 6, f. 19, A, pl. 12, it is agreed that a party dispossessed by force may have an action on the statute of forcible entry without expressly alleging the entry to have been *manu forti*, if it was not congeable (justifiable in law); but, if it was congeable, the action will not lie at all, for the mere forcible entry, where the party dispossessed had no right, is ground only for a fine to the king. Yearb. Hil. 15 H. 7, f. 17 A. pl. 12, is to the same effect. Fitzherb, N. B. 248 H. only repeats the two last cited placita. These are the authorities cited by COLTMAN, J., in *Newton v. Harland*, 1 M. & G. 664, as showing that, in the case of forcible entry, although, by the statutes, "all forcible entries were pro-

(a) Judgment affirmed on Error, in Exch. Ch.; *Harvey v. Bridges*, 1 Exch. 261.

(b) 7 B. Moore, 577.

hibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes." The placita certainly import that, in such an action, the force complained of under the statutes shall not be inquired into if the party dispossessing had title: but it cannot be

*895] maintained that, independently of the question of title, a party ousted by forcible entry may not sue for the prejudice he himself suffers by the committing of that public wrong. It might as well be argued that, if a man owe money to another, who seizes him and takes that money from him by force, no action will lie for the assault. It is incorrect to lay down, as broadly as it is sometimes stated, that public offences are not the subject of action by private persons although such persons individually suffer by them. [PATTESON, J. The same act may be both a public and a private wrong. ERLE, J. The private wrong is recognised, but the consideration of it postponed, in order that the party may prosecute for the public offence.] In Stephen's New Commentaries on the Laws of England, vol. iii. p. 435 (2d ed.), it is said that personal actions are "either brought for the specific recovery of property, or for damages. As regards the competency of the latter kind of remedy, it is to be remarked, that an action for damages will in general lie wherever a right has been invaded—or, in other words, an injury committed, although no damage should have been actually sustained; it being material to the establishment and preservation of the right itself, that its invasion should not pass with impunity." "Injury" must be construed, not in the popular sense, but according to the etymological construction of the word "injuria;" a violation of right. That title does not of itself justify the commission of a trespass to enforce it appears from the cases (though not strictly in point) of *Doe dem. Stephens v. Lord*, 7 A. & E. 610, and *Anthony v. Haney*, 8 Bing. 186. It was

*896] indeed held, in *Butcher v. Butcher*, 7 B. & C. 399, that a party entitled to land, having entered by force upon an intruder, might maintain trespass against him for remaining on the land and doing acts of ownership; but it does not follow that, if the party having title enters *manu forti* (which implies more than *vi et armis*), he is not liable to an action for the wrong done to an individual by an act which the law declares to be a public offence. ASHHURST, J., says in *Taylor v. Cole*, 3 T. B. 292, 296: "No person, who has a right of entry into lands, can be considered as a trespasser for asserting that right, unless it be attended with such acts of violence, as will subject him to a criminal prosecution:" thus intimating that, if such acts did accompany the entry, an action would lie for the trespass. Therefore, in the present case, if the action would have lain against a stranger, it lies against the defendant, notwithstanding his title. [Lord DENMAN, C. J., mentioned *Perry v. Fitzhowe*, 8 Q. B. 757.] There is, indeed, here, a trespass not only upon the land but against the person.

The circumstance, "with a strong hand," cannot, for the purpose of

this justification, be separated from the rest of the narrative; for the third plea (embodying the introductory part of the second) justifies the doing of the acts "as in the declaration mentioned."

Cowling, contra. Even if these pleadings raise the general question argued on the other side (which, however, they do not), the justification is good. It is enough if the defendants justify so much as the plaintiff must necessarily prove to maintain his action: and the plea does not in reality profess to do more. On the *plea of the general issue, [*897 the plaintiff would not be bound to prove an entry with strong hand contrary to the statute: it would be enough to prove that the plaintiff was in possession and the defendants entered upon him. Were this otherwise, the defendant, in an ordinary case of trespass quare clausum fregit, could not succeed on the plea of liberum tenementum, if the plaintiff alleged that the entry was with a strong hand. [WIGHTMAN, J. Might not the defendant except the *manu forti*?] It would be said that this gave the character to the act, and was inseparable from it. According to the argument on the other side the common plea of liberum tenementum, pleaded in *Harvey v. Brydges*, 14 M. & W. 437, to a count for breaking and entering plaintiff's close, in his actual occupation, *vi et armis*, and forcibly expelling him, would have been no answer. But PARKE and ALDERSON, Ba., held it sufficient; PARKE, B., observing; (14 M. & W. 440, 441, 448), that the plea professed to justify, "not all the force that the plaintiff *can* prove, but all that he *must* prove to support the action:" that "under the words '*vi et armis*,' the plaintiff need not have proved anything; neither was he bound to prove the eviction; proof of the trespass would have been enough:" and that, to raise the question discussed in *Newton v. Harland*, 1 Man. & G. 644, the plaintiff should have replied that the defendants used more force than was necessary. So, in *Fisherwood v. Cannon*, 3 T. R. 297, (a) to a count for taking and carrying away plaintiff's halter, and converting it to defendant's use, a justification was pleaded, and, *on issue joined, the defend- [*898 ant had a verdict: a motion was made in arrest of judgment because the plea "did not cover the whole trespass, namely, the conversion. But the Court held that as the defendant's plea had fully answered the gist of the action, which was the taking, the conversion thereof being only aggravation, it became necessary for the plaintiff to reply that the defendant afterwards converted, &c., and thereby became a trespasser ab initio." And BULLER, J., who cited that case in *Taylor v. Cole*, 3 T. R. 292, (b) (referring also to *Sir Ralph Bovy's Case*, 1 Vent. 211, 217,) held accordingly that the breaking and entering, there alleged by the plaintiff were the gist of the action, and that a plea justifying these was sufficient, though the count stated an expulsion likewise. "If," he said, "the plaintiff had intended to take advantage of the ex-

(a) Cited in *Taylor v. Cole*. See *Woods v. Durrant*, 16 M. & W. 149, 155.

(b) Judgment affirmed in Exch. Ch.; *Taylor v. Cole*, 1 H. Bl. 555.

pulsion, which was merely matter of aggravation, he ought to have new assigned it."

But, if the general question arises, the justification is maintainable, though it admits some unlawful violence on the part of the defendants. Were this otherwise, no justification in trespass *vi et armis* could ever have been good; for the *vi et armis* and *contra pacem* admitted in such pleas, were formerly deemed matter of substance; note (1) to *Lowe v. King*, 1 Wms. Saund. 81, Com. Dig. *Pleader* (8 M. 7). When it was usual (before several matters were pleadable under stat. 4 Ann. c. 16, s. 4) to deny the "force and arms, &c., and whatever else is against the peace," &c., that was done, not so much by way of a denial in the cause *899] as to save the fine to the Crown: and now it is, in *ordinary cases at least, disused. If the defendants here have committed acts in breach of the peace, or in the nature of a forcible entry, they may be liable criminally; but no right of action accrues; 2 Hawk. P. C. 29, B. 1, c. 64, s. 3, (a) *Taylor v. Cole*, 3 T. R. 295 (judgment of Lord KENYON), *Taunton v. Costar*, 7 T. R. 431, referred to by DALLAS, C. J., in *Turner v. Meymott*, 7 B. Moore, 576. Again, stat. 8 H. 6, c. 9, s. 6, which gives the action for a forcible entry, applies only to persons having the freehold; *Cole v. Eagle*, 8 B. & C. 409; which the plaintiff here confessedly has not. The cases in the Yearbooks, mentioned on the other side, are strongly in favour of the defendants; so also are the dicta of PARKE and ALDERSON, Bs., in *Harvey v. Brydges*, 14 M. & W. 440—443, though not necessary to the decision of that case. *Newton v. Harland*, 1 Man. & G. 644, may bear some analogy to this case, but is not exactly like it. There the action was for an assault; and the question was, not whether the defendants could justify entering, but whether the defendant Harland was so "lawfully possessed" of the premises on his entry that he might turn out the plaintiff's wife by force. And the Court there was not unanimous. In *Perry v. Fitzhowe*, 8 Q. B. 757, (b) the defendant justified destroying the plaintiff's house, as an act done in assertion of a right of common. Pulling down a dwelling-house to abate a nuisance was clearly an irregular proceeding, and different from that which is justified here. [WIGHTMAN, J. There the words of the replication, "with force and arms and with a *strong hand," were *900] considered not to carry the case beyond the trespass charged in the declaration.] *Hillary v. Gay*, 6 Car. & P. 284, was only a decision *at nisi prius*; and it was not necessary there to decide anything bearing on the present case. The issue was on not guilty. The plaintiff who was tenant of the defendant's premises had promised to go out; a notice to quit had expired; but the defendant had distrained afterwards. [ERLE, J. The mere promise to give up possession, if proved, would not vest a right of entry in the landlord.]

(a) 7th (Leech's) ed. *Cowling* cited the passage from 1 Curwood's *Hawkins*, 495.

(b) See *Burling v. Read*, p. 904, post.

No circumstance appears on the present pleadings, as to the trespass upon the dwelling-house, &c., but an entry of the freeholder and his servants which may have been without breach of the peace, and therefore not the subject of a criminal proceeding. And *Rex v. Wilson*, 8 T. R. 357, proves that, even in an indictment for a forcible entry at common law, such averments of violence are necessary as may show that the defendant "unlawfully" entered.

Hunter, in reply. As to the first point: it is assumed on the other side that the plaintiff here would not be bound to prove the forcible entry. But it could hardly be said in such an action that this was not part of the gist. In *Yearb. 14 H. 6, f. 16 A, pl. 58*, to a declaration on the statute of forcible entry, 8 H. 6, c. 9, it is said to be no sufficient plea, that the freehold was in J., and defendants, as his servants and by his command, entered peaceably, without this, that they entered with a strong hand; though such a plea might have been sufficient in an action of trespass. [WIGHTMAN, J. *Is yours an action on the statute of forcible entry? If not, the manu forti is merely aggravation, [*901 which may or may not be proved. PATTERSON, J. It is said in *Lowe v. King*, 1 Saund. 81, that, in an action of trespass, "if the defendant be acquitted of the special matter, the *vi et armis* shall not be inquired into. So if the defendant be acquitted of the special matter by judgment on demurrer, the *vi et armis* shall not be tried, although the defendant has taken issue thereon, but he shall be fined, and a capiatum awarded against him without more."] The decision in *Perry v. Fitzhowe*, 8 Q. B. 757, as to the averments of force, turned upon the particular form of the replication as compared with the counts pleaded to. [WIGHTMAN, J. It was decided there that "with a strong hand" meant no more, in that action, than the ordinary *vi et armis*.] As to the principal point; the statute 8 H. 6, c. 9, s. 6, is cumulative only, and does not limit the common law right of action for a forcible entry. The issue in *Hillary v. Gay*, 6 Car. & P. 284, was, it is true, on Not guilty; but the New rules were not then in force. BOSANQUET and ERSKINE, Js., in *Newton v. Harland*, 1 Man. & G. 661, 666, cite the case as applicable to the question then before the Court.

Lord DENMAN, C. J. We all thought at first that the allegation, "with a strong hand, and against the form of the statute," was matter which might be proved under the plea of Not guilty, and so was disposed of by the pleadings as they now stand. But on that we pronounce no opinion. I think that, with reference to the third plea, the "strong hand" and "against the statute," if *they necessarily form part of what is [*902 met by that plea, are mere aggravation; and the defendants' counsel has convinced me that the plea offers sufficient justification. In *Perry v. Fitzhowe* the particular circumstances which made the defendant's proceeding unjustifiable in point of law appeared by the declaration. Here the declaration states only in general terms that the defendants with *

strong hand, and against the form of the statute, broke and entered the dwelling-house and committed other trespasses. Referring to *Taylor v. Cole*, 3 T. R. 292,^(a) and other authorities which have been cited, I have no doubt that the first allegations are matter of aggravation merely, and that the material averments are sufficiently met by the plea.

PATTERSON, J. I think the expressions, "with a strong hand, and against the form of the statute," are mere aggravation. Mr. *Cowling* did not and could not argue that, if the allegation in the count consisted of two parts, each of which established a substantive trespass, it would be enough to justify as to one: but that is not the present case. This is quite analogous to the case of a count in trespass, where it has been held that the conversion was matter of aggravation and not of substantive charge, and was not necessary to be proved by the plaintiff as part of the gist of his action. Therefore the third plea is good. How far the *manu forti* could be brought in question under the general issue as here pleaded, it is unnecessary to say: the averment is certainly not the same as *vi et armis*.

*903] *WIGHTMAN, J. The gist of this action is the breaking and entering: the *manu forti* and "against the form of the statute" are mere aggravation. The plea is sufficient if it justifies that which is the gist of the action. If the plaintiff meant to say that more than necessary force was used, he might have replied by a new assignment or a plea of that nature. To hold the present plea good, is consistent with all the authorities. I was struck with the passage cited at the bar from *Hawkins's Pleas of the Crown*,^(b) where it is stated that, in an action of forcible entry grounded on the statute, "if the defendant make himself a title which is found for him, he shall be dismissed without any inquiry concerning the force." But a question on the statutes of forcible entry, if raised by the pleadings, would be very different from that now before us.

ERLE, J. I am of opinion that the mode of the breaking and entering, as here stated, is mere aggravation, and the plea a good answer.

Judgment for defendants.^(c)

(a) Judgment affirmed in *Exch. Ch.*; *Taylor v. Cole*, 1 H. Bl. 555.

(b) Vol. ii. p. 29, B. 1, c. 64, l. 2, 7th ed. Ant^a, p. 699.

(c) See the next case.

*The following case, decided in Easter term, 1850, may properly follow Davison v. Wilson, antè, p. 890. [*904]

BURLING v. JOHN READ, ROBERT PATE, WILLIAM PATE the Elder, WILLIAM PATE the Younger, and WILLIAM MARTIN PATE. [April 20, 1850.]

To a declaration in trespass, charging that defendant broke and entered plaintiff's workshop, while plaintiff was inhabiting and present in it, and, while plaintiff was so inhabiting and present, pulled it down, defendant pleaded pleas asserting that the workshop was defendant's, and denying that it was plaintiff's.

Held that, on issues joined upon these averments, it was immaterial whether plaintiff was or was not inhabiting and present at the time of the alleged trespass; and that defendant was entitled to the verdict upon proof that he had a right to the soil.

TRESPASS. The first count charged that defendants, on, &c., with force and arms and with a strong hand, broke and entered a workshop of plaintiff, situate in the parish of Haddenham in the county of Cambridge, that is to say, &c. (abuttals), in which said workshop plaintiff was, at the said several days, &c., inhabiting and actually present, and then made a great noise, &c., and also then, and while the plaintiff was inhabiting and actually present in the said workshop, pulled down, prostrated, &c., the chimneys, roof, &c., and pulled down, &c., and removed certain fixtures of plaintiff, to wit, &c., then affixed to and part of the said workshop, and also then, with force and arms and with a strong hand, and while plaintiff was inhabiting and actually present in the said workshop as aforesaid, pulled down, prostrated, destroyed, and levelled to the ground the chimneys, roof, walls, &c., and pulled down and removed certain fixtures and effects of plaintiff, to wit, &c., then affixed to and part of the workshop, and also then, with force and arms and with a strong hand, and while plaintiff was inhabiting and actually present in the workshop as aforesaid, pulled down, prostrated, and demolished the workshop, and also, during the time *aforesaid, seized and took the materials, &c., of plaintiff, and carried away and converted the same, and then, [*905 to wit, &c., with force and arms and with a strong hand, ejected and expelled plaintiff from the possession, &c., of the said workshop, and kept him so expelled, &c.: and also, during the time aforesaid, to wit, &c., with force and arms, seized, &c., divers chattels, to wit, &c., of plaintiff, then being in the said workshop, &c. (alleging conversion).

Second count, for assaulting and beating plaintiff, and forcing him out of the workshop.

Pleas 1 and 2, leading to issues of fact, not now material.

3. To the 1st count. That the workshop, fixtures, effects, materials, and chattels were not, nor was either, &c., the workshop, fixtures, &c., of plaintiff, in manner, &c.: conclusion to the country. Issue thereon.

4. To the 1st count, except so far as the same charges defendants with having committed the supposed trespasses with a strong hand, and whilst plaintiff was inhabiting the said workshop, and actually present:

That, before and at the said several times when, &c., defendants W. Pate the elder and W. Pate the younger were the churchwardens, and James Rose and Jonathan Tyson were the overseers of the poor, of the said parish of Haddenham, duly appointed; and that the said workshop, at the several times when, &c., was the workshop, soil, and freehold of the said churchwardens and overseers: wherefore defendants W. Pate the elder and W. Pate the younger, as such churchwardens, in their own right, and Read, R. Pate, and W. M. Pate, as the servants of the said churchwardens and overseers and by their command, at the several times when, &c., *broke, &c.: justifying the breaking and enter-
 *906] ing the workshop, making a noise, &c., breaking, &c., the chimneys, &c., and pulling down, &c., the workshop and seizing, &c., the materials, &c., and removing the goods and chattels as encumbering, &c.: verification. Replication: that the workshop was not the workshop, soil, and freehold of the churchwardens, &c., or any or either, &c.: conclusion to the country. Issue thereon.

5. To the 2d count, allegation of possession, by the churchwardens and overseers, of a workshop, and that plaintiff was unlawfully there, with force and arms making a noise, &c.; wherefore defendants, in their own right and as servants (as before, respectively), requested plaintiff to cease making the noise, &c., and to depart, and, on his refusal, *molliter manus*, &c., to remove him: verification. Replication, traversing the possession by the churchwardens, &c.: conclusion to the country. Issue thereon.

On the trial, before POLLOCK, C. B., at the last Cambridgeshire assizes, evidence was given, for the plaintiff, to show that he had built the workshop, and that the defendants entered and took possession of it, and pulled it down, while the plaintiff was in it; and, for the defendants, to show that the parish officers were legally entitled to the soil under stat. 59 G. 3, c. 12, s. 17. The Lord Chief Baron told the jury that, if they were satisfied that the plaintiff had no right to the possession of the workshop, and the parish officers had title to it, they were entitled to take immediate possession, and, when so in possession, to pull the workshop down; and that in that case the 8d, 4th, and 5th issues, so far as regarded the workshop and all affixed to the freehold, must be found for the defendants; (a) for that, as to those *issues, it was
 *907] immaterial whether, at the time of the act complained of, the plaintiff was or was not in the house. The jury found for the plaintiff on the first and second issues, and for the defendants on the fourth and fifth; and, on the third, they found for the plaintiff so far as regarded the goods and chattels, and for the defendants so far as regarded the workshop and fixtures.

Prendergast now moved for a new trial, on the ground of misdirection. The defendants, supposing them to have full title to the soil, were not

(a) See *Jones v. Chapman*, 2 Exch. 505.

warranted in entering and pulling down the building while the plaintiff was actually in it; *Perry v. Fitzhowe*, 8 Q. B. 757. [PATTESON, J. The question there was as to a commoner pulling down a cottage, said to be a nuisance, by way of abating it, while the inhabitants were in it. The question here is, whose was the workshop?] A commoner would have as full a right to pull down the cottage, if a nuisance, as an owner would have to pull down his own house: whatever controlled the one right would control the other. The law of distress is controlled in the same way; a horse which a man is actually riding cannot be distrained.

Lord CAMPBELL, C. J. I think the direction was quite right, though there is on the record the immaterial allegation of the plaintiff being actually in the workshop. The plaintiff is a trespasser: what right can he have to prevent the owner of the soil from pulling down the house? I pronounce no opinion against the decision in *Perry v. Fitzhowe*, 8 Q. B. 757; I assume it to be right: but that case is clearly distinguishable from this, where the *house is not the dwelling-house of the plaintiff, and where the act complained of is the act, not of a commoner who seeks to abate a nuisance, but of the owner of the house. It would be giving a most dangerous extension to the doctrine in *Perry v. Fitzhowe* (assuming the decision there to be correct), if we were to hold that the owner of a house could not exercise the right of pulling it down, because a trespasser was in it. [*908

PATTESON, J. In *Perry v. Fitzhowe* the action was brought by the owner of the house, who was in it at the time of its being destroyed: and the justification set up was by a person entitled to common on the land where the house was built, who made no claim to title in the house: and we held that the commoner could not assert his right of common by knocking a house about the ears of the owner. There was no pretence that the house was not the house of the plaintiff. But here the defendants say that the plaintiff is a mere stranger, and the jury so find. It never can be that a mere stranger acquires a title by intrusion, except in the time prescribed by the Statutes of Limitation. The inhabiting makes no difference: it cannot prevent the owner of a house from doing what he likes with it. The plaintiff here has no right at all: in *Perry v. Fitzhowe* he had the right to the possession. That case seems to have led to a mode of declaring under circumstances to which the decision is inapplicable. It seems to be now the fashion, in all cases of trespass to a house, to say that the trespass was committed while the plaintiff was in it.

*WIGHTMAN, J. I agree, and for the reasons given by my Lord [*909 and my brother PATTESON.

ERLE, J. It is very important that the distinction between *Perry v. Fitzhowe* and such a case as this, pointed out by my Lord and my brother PATTESON, should be understood. Otherwise parties might imagine that they acquired some right by merely intruding upon land in the night,

running up a hut, and occupying it before morning. It should be made known that that is a misapprehension of the effect of *Perry v. Fitzhowe*.
Rule refused.

The QUEEN v. The Inhabitants of COLERNE. May 6.

Where a notice of chargeability, under stat. 4 & 5 W. 4, c. 76, s. 79, is signed by A., B. and C., styling themselves "overseers of the poor" (but not "the" or "a majority of the" overseers) of parish D., and it does not appear, by evidence on trial of the appeal, that they are not all or a majority of the overseers, the notice is sufficient.

ON appeal against an order of justices for removing Mary Stillman Davis, widow, and her four children, from the parish of Melksham to the parish of Colerne, both in Wiltshire, the Sessions confirmed the order, subject to the opinion of this Court on a case, in substance as after stated.

The notice of chargeability was as follows. "Parish of Melksham in the county of Wilts. As to the removal of Mary Stillman Davis," &c. "To the overseers of the poor of the parish of Colerne in the county of Wilts. Take notice that the above named Mary Stillman Davis," &c., "have become and now are actually chargeable to the said parish of Melksham, and are now receiving relief from the said parish; and that an order of justices has been obtained for their removal to your *910] parish of Colerne as their last place of legal settlement" (referring to copies of order and examinations, sent with the notice): "and take notice that, unless you appeal" &c., "the said paupers will be removed to your said parish of Colerne, pursuant to the said order. Dated this 10th day of November, 1845.

ABM. DAVIS,	} Overseers of the poor of the said parish of Melksham."
GEO. POCKOCK,	
GEORGE WATSON,	

The appellants did not attempt to show that the notice was not in point of fact signed by the majority of the officers. But they relied upon the legal objection that the notice was bad on the face thereof, inasmuch as it did not state affirmatively or by necessary inference that the notice either was, or purported to be, signed by a majority of the parish officers of Melksham. The Sessions overruled this objection.

The order of removal was on the same piece of paper with the notice of chargeability. (The case then set it forth.)

The appellants objected to this order that the magistrates thereby adjudicated (a) upon the settlement of the paupers in Colerne without stating how that judgment was arrived at, whether by the examination of witnesses on oath, or otherwise. The Sessions overruled this objection also.

(a) The form of adjudication was: "We the said justices, upon examination of the premises upon oath, and other circumstances, do adjudge the same to be true, and do also adjudge the place of the legal settlement" &c. "to be" &c.

If the Court of Queen's Bench should be of opinion that the Sessions were wrong in overruling either of these objections, the order of Sessions was to be quashed; if otherwise, it was to stand confirmed.

**Hodges and L. H. Fitzgerald*, in support of the order of sessions. First: It is true that the notice ought to have been signed by a majority of the parish officers; *Rex v. The Justices of Warwickshire*, 6 A. & E. 878; *Rex v. The Justices of Derbyshire*, 6 A. & E. 885: and, if the Sessions had expressly negatived that fact, the order of removal could not have been upheld, according to *Rex v. Morgam*, 1 T. R. 775: but, in the absence of express finding, this Court will, if possible, intend in favour of the due execution; *Rex v. Hinckley*, 12 East, 861; *Rex v. Catesby*, 2 B. & C. 814. In *Regina v. Westbury*, 5 Q. B. 500, a notice, signed, by three persons, "G. M., R. W., J. B., overseers of the parish," &c., and not showing them to be a majority of the parish officers, was held insufficient: but there the special case found that there were in fact four overseers and two churchwardens. *Regina v. Justices of the West Riding*, 8 Dowl. & L. 152, is a direct authority here. In that case a notice of appeal was signed by persons styling themselves "a majority of the churchwardens and overseers of the parish of," &c.; and it was argued, under stat. 4 & 5 W. 4, c. 76, s. 81, that the notice should purport to be signed by "the overseers," or by a majority duly authorized, and assuming to act for them; and that, in the absence of such statement, the presumption was against the authority. But *WILLIAMS, J.*, in the Bail Court, held that the presumption was the contrary way; and that, "in order to render the notice insufficient, it lay on the other side to show that the persons giving it were not really a majority competent to do so." The appellants *here have appeared and tried the appeal; they cannot, therefore, now complain of the notice. (The second objection was abandoned, the appellants' counsel admitting that *Regina v. Rotherham*, 8 Q. B. 776, 782, 3, was conclusive.)

Slade, contra. It ought at least to appear, as it did in *Regina v. Justices of the West Riding*, that the notice was signed by a majority. That is not stated here; nor do the subscribing parties call themselves "the" overseers, &c. It is true that in *Regina v. Westbury* there was extrinsic evidence that the parish had four overseers and two churchwardens; but two Judges, at least, intimated that the parties signing should appear by the notice itself to be a majority. Here that does not appear on the notice or by the case. In *Rex v. Austrey*, 6 M. & S. 319, a parish certificate was signed by two churchwardens and an overseer, but had only two seals; and it was contended that one of them might be deemed the seal of more than one party: but the Court refused to assume this, insisting on the principle, "wherever a power is given to any particular persons to do any written act in any particular manner, or under certain particular circumstances, whether it be to parish officers or ma-

gistrates, to grant certificates under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants, or make orders, that their authority must appear upon the instrument itself." In *Ex parte* the Overseers of Harnley, 1 Dowl. & L. 673, a township, incorporated under Gilbert's Act, 22 G. 3, c. 83, gave notice *913] of appeal, signed by "certain persons styling themselves overseers, and by another person who was a guardian, but subscribed his name without any addition; and PATTESON, J., held this insufficient. [PATTESON, J. I do not recollect the case; but there the party might have been a mere stranger. WIGHTMAN, J. If the overseers here had merely signed their names, the case might have been in point. Here they style themselves overseers; is not it to be presumed that they are all the overseers?]

Lord DENMAN, C. J. This case is quite clear. We are bound to presume that these persons who are stated to be overseers, and may be the majority, are the majority.

PATTESON, J. The case is clear. The omission by an officer of the character in which he acts is quite a different objection.

WIGHTMAN and ERLE, Js., concurred. Order of Sessions confirmed.

The QUEEN v. CRESPIN. *May 9.*

A count in an indictment charged that defendant made an assault upon one "Henry B.," "and him, the said William B., did beat," &c., "and other wrongs to the said William B." did, to the "damage of the said William B." On motion in arrest of judgment:
Held, sufficient.

THE defendant Henry Crespin was indicted at the Devonshire Quarter Sessions. The indictment charged that he, "on the 28d day of August, A. D. 1847, with force and arms, at," &c., "in and upon one Henry *914] Burlton Benett, in the peace, &c. "then and *there being, did make an assault, and him, the said William Burlton Benett, then and there did beat, wound, and ill treat, and other wrongs to the said William Burlton Benett then and there did, to the great damage of the said William Burlton Benett, and against the peace," &c. The indictment having been removed by certiorari, the defendant pleaded Not guilty. The case was tried, before WIGHTMAN, J., at the last Devonshire assizes, when a verdict was found for the Crown. And now, *Crowder* moving for judgment,

Kinglake, Serjt., moved in arrest of judgment. The indictment is inconsistent: it states a single assault upon two different persons. If, indeed, the indictment could be considered as complete on the statement of the assault, and what follows could be rejected, there would be no repugnancy: but this cannot be done: the charge is of the single offence

of assault and battery. In *Rex v. Heaps*, 2 Salk. 598, two defendants only were convicted of riotously assembling and riotously assaulting J. R.: and it was moved in arrest of judgment that two could not make a riot; in answer to which it was suggested that an assault was charged as well as the riot: but HOLT, C. J., said that the battery was laid only as part of the riot, and the defendants, being discharged of the riot, were discharged likewise of the battery, and no judgment could be given. Yet it seems clear that, if there be only a charge of riotously assaulting, there may be a conviction for a simple assault. The case therefore is an authority against separating the two charges in this indictment. The Court cannot see which part is to be rejected. But, secondly, if this be not so, the indictment is bad for alleging two distinct offences. In *Rex v. Clendon*, 2 Ld. Raym. 1572, the defendant was convicted of an assault and battery upon two persons; and judgment was arrested. That case is indeed denied to be law, in *Rex v. Benfield*, 2 Burr. 980, 984:(a) but the general principle, that one count must not contain two distinct offences, is not impeached: the ruling in the last case is merely that an assault upon two persons, or the singing of a song which slanders two, does not necessarily comprise two distinct offences. In *Rex v. Fuller*, 1 B. & P. 180,(b) there is a *semble* that a count may be good which charges an endeavour to incite to the commission of two distinct offences, provided there be but one endeavour. That might be consistent with the argument for the present defendant; and indeed, but for the assumption of such a principle, the question could not have arisen. In *Rex v. Salomons*, 1 T. R. 249, 252, the Court expressed a doubt whether two distinct offences could be included in one conviction. In *Rex v. Roberts*, Carth. 226, judgment was arrested on an information which charged several extortions. If two offences are charged here, the sentence cannot be distributed so as to apportion a part for one offence and a part for the other: the judgment must be on the whole count. The Court will therefore have to include the latter part of the count, which is absurd, since there is no person to whom the words "said William Burlton Benett" can apply. In Hawk. P. C. 40 (7th ed.), [*916] B. 2, c. 25, s. 72, it is said: "a repugnancy or absurdity in the description of the person injured will vitiate an indictment; as where one is indicted for stealing *bona prodicti* J. S. where no J. S. was mentioned before."

Crowder pointed out that in *Rex v. Morris*, 1 Leach. Cro. C. 109, (4th ed.), the indictment charged that "Francis Morris" feloniously received stolen goods, "he the said Thomas Morris, then and there, well knowing" that they had been stolen; and that, on motion in arrest of judgment, the twelve Judges held that the words "the said Thomas Morris" might be struck out as surplusage.

(a) See *Regina v. Pelham*, 8 Q. B. 959, 963.

(b) See *Wray v. Toke*, 12 Q. B. 492, 498.

LORD DENMAN, C. J. I am glad to find from that case that we have not to make a precedent. There will be no rule.

PATTESON, WIGHTMAN, and ERLE, Js. concurred.

Rule refused.

ROBERTSON and Another v. NORRIS.

A husband takes a freehold interest, during the joint lives of himself and his wife, in land belonging to her in fee-simple; and such interest passes by the deed of the husband alone.

COVENANT, by assignees of a lessor of land, against lessee. The declaration stated that one Mary J. S. Davis had become seised of the reversion in fee, as devisee of lessor, that she had intermarried with one Reymer, and that thereupon Reymer and his wife, in right of his wife, became and were seised in their demesne as of fee of and in the said *917] demised premises, expectant on the determination of the lease: it then alleged that, by indenture, &c., made between Reymer and his wife of the first part, Mary Davis her mother of the second part, and the plaintiffs of the third part, "Reymer granted, bargained, sold and released unto the plaintiffs the said reversion of and in the said demised premises, to hold to the plaintiffs, their heirs and assigns," during the coverture.

2d plea. That "Reymer did not grant, bargain, sell or release unto the plaintiffs the said reversion of and in the said demised premises," modo et formâ. Issue thereon.

On the trial before WILLIAMS, J., at the Somersetshire Spring assizes, 1847, it appeared that the indenture of release had not been executed by the wife, and that the husband, who had executed it, was not tenant by the curtesy. It was thereupon objected that her reversion had not passed to the plaintiffs, and that the above issue on their part was not proved. The learned Judge overruled the objection. Verdict for plaintiffs, with leave to move to enter a verdict for the defendant on this issue.

Crowder, in Easter term last, obtained a rule nisi, accordingly. In last Hilary vacation, (a)

Butt and *Barstow* showed cause. The husband took a freehold interest during the joint lives of himself and his wife. This point is discussed in note (2) to Co. Lit. 826 a. "But though by our law a woman does *918] not now communicate her rank or titles of honour *to her husband, yet the freehold, or the right of possession, of all her lands of inheritance, vests in him immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351 a, 273 b. And see *Pothier Traité des Fiefs*, vol. i. p. 123.(a) This estate he may convey to

(a) February 11th. Before Lord DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, Js.

(b) See *Œuvres Posthumes*, tom. 1. p. 50 (ed. 1777). Part I ch. 2, art. 2.

another. An incorrect statement in the book called *Cases in Equity*, during the time of Lord TALBOT, fol. 167, of what was delivered by his Lordship in the case of *Robinson v. Comyns*, Ca. Eq. Temp. Talbot, 164, 167, seems to have given rise to a notion that the husband could not make a tenant to the præcipe of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can." Authorities to the same effect are collected in 1 Roper's Husb. and Wife, p. 8, 2d ed. The land might have been extended under an elegit against the husband; note (1) to *Underhill v. Devereux*, 2 Wms. Saund. 69 c (6th ed.): if he had become bankrupt, a freehold interest during the coverture would have passed to his assignees; *Michell v. Hughes*, 6 Bing. 689, 695, citing Com. Dig. tit. *Bankrupt* (D 11).

Crowder and *Montague Smith*, contra. By the argument for the plaintiffs, the wife is treated as altogether an unnecessary party to the deed of assignment. Yet the declaration itself states, as was necessary that husband and wife in right of the wife were seised: and they must both have joined in an action for breach of covenant; 1 Bac. Abr. 729, 7th ed. tit. *Baron and Feme* (K). If the husband had the freehold, it could not be in the wife in case of his attain. Yet it is said in Co. Lit. 351 a: "It appeareth here by Littleton, that if a man taketh to wife a woman seised in fee, he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to work a remitter, and yet the estate which the husband gaineth dependeth upon uncertainty, and consisteth in privity; for if the wife be attainted of felony, the lord by escheat shall enter and put out the husband: otherwise it is if the felony be committed after issue had. Also, if the husband be attainted of felony, the King gaineth no freehold, but a pernancy of the profits during the coverture, and the freehold remaineth in the wife." The note to Co. Lit. 326 a, cited for the plaintiffs, stating that the wife's freehold vests in the husband on marriage, is correct: but the freehold vests in the wife also; it vests in both, in right of the wife. "In a real estate, he" (the husband) "only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless by the birth of a child, he becomes tenant for life by the curtesy;" 2 Bl. Comm. 438.

Cur. adv. vult

Lord DENMAN, C. J., in this term (May 1st), delivered the judgment of the Court.

A question arose in this case as to the interest which a husband takes in lands which belong to his wife in fee simple, and as to his power to convey to another person an interest in those lands for the joint lives of himself and wife.

*It is laid down in Co. Lit. 351 a, that he is entitled to the pernancy of the profits, and that, if he be attainted, that per- [*920

nancy will pass to the Crown, the freehold still remaining in his wife. But it is also laid down in Co. Lit. 326 a, and in the notes, that he may make a tenant to the præcipe of his wife's land, and that he has an estate which he may convey to another. He has not, however, any greater interest than during the joint lives of himself and his wife.

Now the second issue raised by the pleadings in this case, which was an action of covenant on a lease made by a person who had afterwards devised to the wife, was, whether the husband did by indenture convey to the plaintiffs the reversion, of which he and his wife were seised in right of the wife, to hold to the plaintiffs during the coverture of the wife with the husband. This he certainly did. The indenture professed to be made by him and his wife, but was not executed by her; and it passed no more than his interest. That was an estate during the joint lives of himself and his wife, which was all that he professed to convey by the terms of the deed.

The rule to enter a verdict for the defendant on that issue must be discharged.

Rule discharged.(a)

(a) Reported by H. Davison, Esq.

*LEWIS v. HANCE.

[*921

The County Courts' Act, 9 & 10 Vict. c. 95, did not deprive an attorney of his privilege to sue in the Superior Courts.

CREASY, in Hilary term last, obtained a rule nisi to stay proceedings on a writ of *fi. fa.* issued on behalf of the plaintiff in this cause, and to enter judgment for the amount of the verdict only, without costs, or to enter a suggestion on the roll, under sect. 129, of the County Courts' Act, 9 & 10 Vict. c. 95, to deprive the plaintiff of costs, the jury having given a verdict for less than 20*l.* in an action of assumpsit, brought in this Court, by the plaintiff as endorsee of a bill of exchange, accepted by the defendant, for 15*l.* 7*s.* 6*d.* The plaintiff was an attorney of this Court. In the same term,(a)

Lush showed cause. The privilege of an attorney to sue in the Superior Courts, is not affected by stat. 9 & 10 Vict. c. 95. Section 129 enacts that, "if any action shall be commenced after the passing of this act in any of her Majesty's Superior Courts of record, for any cause other than those lastly hereinbefore specified" (among which the cause now in question is not included), "for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall

(a) January 31st, 1848: Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, Jc

have judgment to recover such sum only, and no costs." *Section 67 enacts: "That no privilege, except as hereinafter excepted" (such exceptions being in sections 140 and 141, and relating solely to the Universities of Oxford and Cambridge, and to the Courts of the Stannaries of Cornwall), "shall be allowed to any person to exempt him from the jurisdiction of any Court holden under this act." But the privilege of an attorney is not to be taken away by implication; per BLACKSTONE, J., in *Gerard's Case*, 2 W. Bl. 1123, 1126; and therefore it is not defeated by sect. 129: and the privilege of an attorney, plaintiff in the Superior Courts, is certainly not affected by sect. 67, which enacts that no privilege (unless as excepted) shall exempt any person "from the jurisdiction of any Court holden under this act;"* for these terms cannot apply to any but defendants in the County Courts. *Board v. Parker*, 7 East, 47, decided on sect. 10 of stat. 39 & 40 G. 3, c. civ. (local and personal public), is in point: and *Dyer v. Levy*, 4 Dowl. P. C. 680, and *Johnson v. Bray*, 2 Br. & B. 698, are also authorities for the plaintiff.

Creasy, contra. If attorneys may become endorseees of bills of exchange, made for small sums, for the purpose of suing in the Superior Courts, the beneficial effect of the County Courts' Act will be much impaired. The words of stat. 9 & 10 Vict. c. 95, ss. 67 and 129, taken in their ordinary meaning, are clear against the plaintiff. The reasons for an attorney's privilege are obsolete. Formerly he was compelled to be in commons at his inn of Court or Chancery one week in every term, and to have chambers near his inn; Com. Dig. tit. *Attorney* (B 3). *Board v. Parker* was decided on *the authority of *Gardner v. Jessop*, 2 Wils. 42, and *Wiltshire v. Lloyd*, 1 Doug. 881, both of [*922 them cases under the Middlesex County Court Act, 23 G. 2, c. 83, which (sect. 4) provided that no persons should be liable to the jurisdiction of the new Court instituted by that act, who were not liable to the jurisdiction of the former County Court. *Wright v. Skinner*, 4 Dowl. P. C. 745, was also a case under the same act, and was itself decided on the authority of *Dyer v. Levy*. But *Dyer v. Levy* is distinguishable from the present case, for sect. 28 of stat. 5 G. 3, c. 8, the earlier Blackheath Small Debts Act, expressly took away the privilege of an attorney defendant in the local Court, and so, impliedly, saved his privilege in other respects. The same distinction applies to *Board v. Parker* itself, with reference to sect. 10 of stat. 39 & 40 G. 3, c. civ., and to *Willoughby v. Fenton*, 2 Jurist, 1041 (Bail Court), a case on the Gravesend Small Debts Act, 47 G. 3, sess. 2, c. xl. (local and personal, public), which, by sect. 80, made an attorney subject to the jurisdiction of the local court when defendant, and expressly disallowed his privilege of exemption from its process. In all the cases cited, the local courts have been isolated and exceptional institutions; whereas the courts established

by stat. 9 & 10 Vict. c. 95, are the results of one uniform policy and system extended throughout the kingdom. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (May 1st), delivered the judgment of the Court.

*924] The question in this case is, whether an attorney *plaintiff is within the provisions of the statute 9 & 10 Vict. c. 95, establishing County Courts. By section 58, jurisdiction is given in all personal actions where the debt or damage claimed is not more than 20*l*. By section 67, it is enacted "that no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any court holden under this act." The only exceptions are the Universities and the Court of the Stannaries, by sections 140 and 141. By section 129 it is enacted that, if any action shall be commenced, after the passing of this act, in any of her Majesty's Superior Courts of record, for any cause other than those lastly hereinbefore specified (the present action is not one of those specified), for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for a sum less than 20*l*., if the said action is founded on contract, the said plaintiff shall have judgment to recover such sum only; and *no costs*.

The present action is on a bill of exchange, and the verdict under 20*l*.; and the motion is to deprive the plaintiff of costs under the 129th section.

It is clear that the Uniformity of Process Act, 2 & 3 W. 4, c. 30, which (a) takes away the process of attachment of privilege, has not altered the right of an attorney plaintiff, although he is obliged to sue by summons like any other plaintiff; *Dyer v. Levy*, 4 Dowl. P. C. 630, and other cases. It seems equally clear that the 129th section would not of itself deprive an attorney plaintiff of his privilege to sue in the Superior Courts without the risk of losing costs. The language of that *925] section is not at all stronger *than that of stat. 39 & 40 G. 3, c. civ. s. 12, "if any action or suit shall be commenced in any other Court than the said Court of Requests, for any debt not exceeding the sum of 5*l*., and recoverable by virtue of the said recited acts and of this act, or any of them, in the said Court of Requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise have or be entitled to any costs whatsoever." Under which act it was held, in *Board v. Parker*, 7 East, 47, that the plaintiff, an attorney, did not lose his privilege, and was not bound to sue in the Court of Requests at the peril of costs if he sued elsewhere. Nor are the words so strong as those in 10 G. 3, c. 29, s. 3, on which *Dyer v. Levy* was determined; for there it is provided that no action for any debt recoverable by the said act shall be brought in any of his Majesty's Courts at Westminster;

and, if it be, judgment shall be given for the defendant. Yet an attorney plaintiff was held not to be within the act. So by stat. 23 G. 2, c. 33, (the Middlesex County Court act), sect. 19, it is enacted that, if any action shall be commenced in any of his Majesty's Courts of Record, and the defendant shall be liable to be summoned to the said County Court, and the jury shall find damages for the plaintiff under 40s., no costs shall be awarded to the plaintiff in such action, but the defendant shall be entitled to double costs of suit. Yet an attorney plaintiff was held not within the act; *Hussey v. Jordan*, cited in the note to *Wiltshire v. Lloyd*, 1 Doug. 381, 382, n. [97]. *Johnson v. Bray*, 2 Br. & B. 698, is to the same effect *on a similar act: also *Willoughby v. Fenton*, 2 Jurist, 1041. In all these cases the debt was recoverable [*926 in the Court created by the act, and the plaintiff might have sued there if he pleased; yet by reason of his privilege as an attorney he was held not to be bound to do so.

Unless we overrule all these cases, we cannot hold that the 129th section of the County Court Act per se subjects the plaintiff to loss of costs.

But the 67th section was relied on, which undoubtedly takes away the privilege of an attorney when defendant; for it enacts that no privilege shall be allowed to any person "*to exempt him from the jurisdiction of the County Court.*"

It is contended that these words are large enough to embrace the obligation of a plaintiff to sue, as well as the liability of a defendant to be sued, in the County Court.

In the Middlesex County Court Act, 23 G. 2, c. 33, there is no such clause; therefore an attorney, whether plaintiff or defendant, has been held not to be within that act. In the other acts, on which the cases cited have turned, there is such a clause. In stat. 39 & 40 G. 3, c. civ., s. 10, it is enacted, "*that no privilege shall be allowed to exempt any person from the jurisdiction of the said Court of Requests, on account of his being an attorney or solicitor;*" "*but that all attorneys, solicitors,*" &c., "*shall be subject to the several processes, orders, judgments, and executions of the said Court of Requests, in the same manner as any other persons.*" The Court, in *Board v. Parker*, 7 East, 47, held those words to be applicable only to defendants. The 67th section of the County Courts Act is in the same language as the early *part of the 10th section of stat. 39 & 40 G. 3, c. civ.; but the subsequent [*927 words about "*processes,*" &c., are not inserted: and the Court in *Board v. Parker* commented on those latter words undoubtedly, though the decision does not appear to have turned upon them.

A debtor when sued in the County Court is at once placed within its jurisdiction; and the abolition of any privilege, which would otherwise exempt him from it, is intelligible. But it is difficult to see how a creditor who does not choose to sue in the County Court, though he may do

so, but who chooses to sue in a Superior Court, as he still may, at the peril of costs, can be said to be within the jurisdiction of the County Court. That court cannot in any way punish him or call him to account for not suing in it, or exercise any sort of jurisdiction over him, as to costs or otherwise, when he sues in another court. He requires no privilege to exempt him from the jurisdiction of the County Court; for he never was within it; and, therefore, the abolition of any privilege he may have cannot affect his position as regards the jurisdiction of the Court. It is true that an unprivileged person, suing in the Superior Courts where he might have sued in the County Court, is liable to forfeiture of costs; but that is by reason of the enactment in the 129th section, and in no way depends on the 67th, which seems wholly inapplicable to a creditor not choosing to sue in the County Court. If the words of the 67th section had been that no "privilege should be allowed to any person to exempt him from the *provisions of this act*,"(a) or any *928] similar words, they would no doubt have embraced plaintiffs attorneys; but the words are "from the jurisdiction" of the County Court, that is from being dealt with, from having power exercised over him, by the County Court. But it is plain that the *County Court* cannot deal with, cannot exercise any power over, any creditor, privileged or not privileged, who refuses to sue in that Court. Neither of the sections, 67th or 129th, per se affect an attorney plaintiff suing in a Superior Court.

Can we then apply the 67th section to the 129th, so as to see that, reading them together, the legislature clearly intended to take away the privilege of an attorney plaintiff, and subject him to the risk of costs, if he sue in a Superior Court where he might have sued in the County Court? We think that we cannot; and that, however desirable it may be that attorneys should be subjected to that risk like other plaintiffs, the legislature has not so said, even if it so intended.(b) Rule discharged.(c)

(a) Sect. 18 of stat. 12 & 13 Vict. c. 101, is in the terms above suggested: see the next note.

(b) See *Jones v. Brown*, 2 Exch. 329; and see also stat. 12 & 13 Vict. c. 101, "to amend the act for the more easy recovery of small debts," &c. (9 & 10 Vict. c. 95): which, by sect. 18, enacts "that no privilege shall be allowed to any attorney, solicitor, or other person, to exempt him from the provisions of this act or the said act."

(c) Reported by H. Davison, Esq.

*929] *The QUEEN v. JAMES BUTTON, GEORGE BUTTON, WELSFORD, and CORDEROY.

In an indictment, one count charged that L. carried on the trade of a dyer, and defendants were employed by him as his servants in the management of the trade, and it was their duty as such servants to employ the vats and dye of L. for his benefit, and for dyeing such woollen materials as might belong to themselves, or be intrusted to them by L. for those purposes, and on no other materials: that defendants unlawfully conspired, fraudulently and without L.'s consent, to employ the vats and dye in dyeing woollen materials not belonging to themselves,

and not intrusted to them by L., and to obtain thereby profit to themselves, and to deprive L. of the benefit and use of his vats and dye: that defendants, in pursuance of the conspiracy, wilfully and without L.'s consent, received woollen materials, and, wilfully and without his consent, and at his expense, with his dye and vats, dyed the same for their own profit. Another count charged that defendants, having engaged themselves and being employed by L., as his servants in managing the trade, conspired by artful means to obtain money by fraudulently and without L.'s consent using his dye and implements of trade in dyeing woollen, &c., materials for their own benefit, and to the injury of L.; that, in pursuance of the conspiracy, they, wilfully and without L.'s consent, received woollen materials, and, wilfully and without L.'s consent, at his expense, and with his dye and implements, dyed the materials for their own profit.

On motion in arrest of judgment: Held, that the indictment showed a misdemeanor; that the gist of the charge was the conspiracy; and that no felony appeared in which the misdemeanor could be merged.

The evidence at the trial was that L. permitted defendants to use his dye, &c., for their own materials, and such as he intrusted them with, but that they had made a profit by using them for other materials without his knowledge: there was no proof of a conspiracy besides the concurrence in the act. Held that, assuming the act itself to be a larceny, defendants might still be convicted of the conspiracy as a distinct offence.

THE four defendants were indicted at the Central Criminal Court, for a misdemeanor. The indictment contained ten counts, of which the third and fourth only are here material.

3d count. That, before and at the time of the conspiracy next mentioned, Charles Lewis "carried on the trade and business of a dyer, and had in his possession and upon his premises divers vats and large quantities of dye and other implements necessary for the carrying on the trade and business:" and that James Button, &c. (the defendants) "were employed and retained by the said Charles Lewis, as his servants, in and about the management of the said last-mentioned *trade and [980 business; and that it was their duty, as such servants, to employ and use the last-mentioned vats, dyes, and other implements in and for the benefit, profit, and advantage of the said C. Lewis, and for the dyeing, preparing, and working up of such woollen, silken, cotton, and other materials, as might belong to themselves, or be intrusted to them by the said C. Lewis for the purposes last aforesaid; and to employ and use the said last-mentioned vats, dye, and other implements for no other purposes and upon no other materials whatsoever." That defendants, on 1st January, 1888, at, &c., "did unlawfully conspire, combine, confederate, and agree together, and with other persons whose names are to the jurors unknown, fraudulently and without the consent of the said C. Lewis to use and employ the said vats, dye, and other implements in and about the dyeing, preparing, and getting up of divers large quantities of woollen, cotton, and silken materials not belonging to themselves, and not intrusted to them by the said C. Lewis for that purpose, and to obtain and acquire to themselves, by the means last aforesaid, divers large profits and advantages, and to deprive the said C. Lewis of the proper use and benefit of the said last-mentioned vats, dye," &c. That defendants did, "in pursuance of the said last-mentioned combination, conspiracy, and agreement," on the said 1st day, &c., and on other days, &c., "wilfully and without the consent of the said C. Lewis, receive and

take into their possession divers large quantities of materials, that is to say, one thousand yards of woollen materials," &c. (like quantities severally of linen, fustian, cotton, leather, fur, mohair, *and silken materials), "and did, wilfully and without the consent of the said C. Lewis, at his expense, and with his aforesaid dye, vats, and other implements, dye and prepare, and cause, permit, and procure to be dyed and prepared, the said last-mentioned large quantities of materials, and for their own profit and advantage. To the great damage of the said C. Lewis, and against the peace," &c.

4th count. "That before and at the time of the conspiracy herein-after mentioned, the said C. Lewis carried on the trade and business of a dyer; and that" defendants "had engaged themselves and were employed and retained by the said C. Lewis as his servants in and about the management of the said trade and business on his behalf, and for certain wages to be paid to them, which had before that time been agreed upon:" that defendants, on 1st January, 1838, at, &c., "did amongst themselves, and with divers other persons," &c., "unlawfully conspire," &c., "by artful means and devices to obtain and acquire to themselves divers large sums of money by fraudulently, and without the consent of the said C. Lewis, using the dye and implements of trade of the said C. Lewis in and upon the dyeing and otherwise preparing and working upon of divers large quantities of woollen, cotton, silken, and other materials for their own use and benefit, and to the injury and loss of the said C. Lewis in his said last-mentioned trade and business." That defendants did, "in pursuance of the said last-mentioned conspiracy," &c., to wit, on, &c., "and on divers other days," &c., at, &c., "wilfully, and without the consent of the said C. Lewis, receive and take into *their possession divers large quantities of materials, that is to say one thousand yards of woollen materials," &c. (like quantities severally of linen, fustian, cotton, leather, fur, mohair, and silken materials), "and did, wilfully and without the consent of the said C. Lewis, at his expense, and with his dye, vats, and other implements, dye and prepare, and cause, permit, and procure to be dyed and prepared, the said last-mentioned large quantities of materials for their own profit and advantage. To the great damage of the said C. Lewis, and against the peace," &c.

The indictment having been removed by certiorari into this Court, Welsford pleaded Guilty, and the other defendants pleaded Not guilty. The case was tried before ERLE, J., at the Middlesex sittings after Michaelmas term, 1846. Evidence was given that the defendants were employed by Lewis, as alleged, and had permission to use the dyeing materials for his and their own goods only, but that they had used them, without Lewis's knowledge or consent, for dyeing the goods of other persons for their own profit. No evidence was given of a conspiracy, except as shown by their joint acting as above. The learned Judge directed

the jury that, if these facts were proved, the third and fourth counts were proved, expressing his opinion that no larceny was shown, but rather an obtaining of goods by false pretences. On these counts there was a verdict of Guilty; and a verdict of Not guilty on the other counts.

In Hilary term, 1847, *Allen*, Serjt., on behalf of James Button and Charles Button, obtained a rule nisi for a new trial on the ground of *misdirection,^(a) or for arresting the judgment on the ground that the third and fourth counts either disclosed no offence or [*988 showed a felony.

In last Hilary term,^(b)

Sir *F. Thesiger*, *Ballantine* and *Peacock* showed cause. It is argued for the defendants that they have been improperly convicted on this indictment, charging a misdemeanor, because the evidence showed that by the conspiracy alleged they were accessories to the felony afterwards committed in consummation of such conspiracy, so that the misdemeanor became merged in the felony. To raise this objection, it is not enough that circumstances should have been proved which might justify an inference of felony: it should have been clearly established that a distinct and specific felony was committed. But, even assuming that the overt acts in evidence did constitute a felony, the objection cannot prevail. It is difficult to understand the principle on which the doctrine of merger is put; and there is very little to be found in the books upon the subject. Is the principle understood to be that the lesser offence is not to be selected for prosecution lest the greater should go unpunished, and, so, the public safety be endangered, and the forfeiture accruing to the Crown be lost; or that a man might be twice punished for the same offence, because conviction or acquittal upon an indictment for misdemeanor is no *bar to an indictment for felony? The latter principle was suggested *arguendo*, in *Rex v. Cross*, 1 *Ld. Raym.* 711. There, [*984 after conviction for receiving stolen goods, it was moved, in arrest of judgment, that the offence for which the defendants were indicted had been made felony by stat. 3 & 4 *W. & M. c. 9, s. 4*; "and afterwards *HOLT*, Chief Justice, pronounced the opinion of the Court to be, that judgment ought to be arrested. Because now this fact being made felony by the statute, is not indictable as a trespass." On this case it may be observed that, the offence having been made felony by statute, it might be considered a violation of the statute to proceed for the misdemeanor. The same observation may be made on *Isaac's Case*, 2 *East, P. C.* 1081 (ch. xxi. § 8), *Rex v. Evans*, 5 *C. & P.* 553, and *Rex v. Story*, *Russ. & R.* 81. In *Isaac's Case*, John Isaac was indicted for a misdemeanor, in having unlawfully, wilfully, and maliciously set on fire and

(a) Affidavits were also put in; and other grounds for the new trial were insisted on, to which it is not thought necessary to refer further.

(b) January 11th. Before Lord *DENMAN*, C. J., *PATTERSON*, *WIGHTMAN*, and *ERLE*, J. The argument in support of the rule was heard on 18th of January; *WIGHTMAN*, J., was then absent on account of illness.

burnt the house of Thomas Isaac in the occupation of the defendant; which house the indictment alleged was contiguous and adjoining to certain dwelling-houses of other persons; by means whereof the same were in great danger of being set on fire and burnt. The second count was the same, except that it described the house set on fire as the prisoner's own house. "The counsel for the prosecution opened that the charge to be proved against the defendant, though laid as a misdemeanor, was, that he wilfully set on fire his own house in order to defraud the Phoenix Fire Insurance Office; and that in fact his own and several other persons' houses adjoining were burnt down. Upon *985] *which BULLER, J., said, that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony; the misdemeanor being merged; and he could not be convicted on this indictment; and therefore directed an acquittal." In *Rex v. Story* the indictment was for obtaining money by false pretences, and alleged that the prisoner obtained the money by falsely pretending that he was John Storer to whom a money order for 1*l.* was payable. From the evidence it appeared, in addition to the facts alleged in the indictment, that the prisoner, before obtaining the money, being told it was necessary that he should write his name on the back of the order, wrote his real name "John Story." CHAMBRE, J., reserved the point, whether, under the circumstances, the prisoner's signature did not amount to a forgery of a receipt for money, in which the lesser offence was merged: but it became unnecessary to decide the question of merger, as the Judges were of opinion that no forgery had been committed. The same question, however, was decided in *Rex v. Evans*. That was an indictment for obtaining goods by the false pretence that a forged letter of request to deliver goods was a genuine letter; and TAUNTON, J., directed an acquittal, because this was an uttering of a forged letter of request, and, so, a felony within stat. 11 G. 4 & 1 W. 4, c. 66, s. 10. It is also another distinction, as to these cases, that in each the act charged and proved was a single act, and that act a felony. Where the act done is a single act, *986] there, perhaps, the *misdemeanor may be merged in the felony even at common law, and thereby a difficulty be obviated, which might arise on the plea of *autrefois acquit* or *autrefois convict*, if two indictments, the first for the misdemeanor and the second for the felony, were maintainable in respect of the same fact. In the present case, the indictment was for a conspiracy, which is a misdemeanor and nothing more, whatever may be done in pursuance of it. Conspiracy may be followed by a series of overt acts; but, as an offence, it is distinct from them and complete without them; *Rex v. Rispal*, 3 Burr. 1320, *Rex v. Kimberty*, 1 Lev. 62, 2 Hawk. P. C. 119, B. 1, c. 72, s. 2, 7th ed. Its legal character depends neither upon that which actually follows it, nor upon that which is intended to follow it; it is the same offence whether its object be

accomplished or abandoned, and whether that object be to commit murder or merely to raise the price of labour. [Lord DENMAN, C. J. Can the subsequent felony purge the misdemeanor? The jury are sworn to try the fact of conspiracy; ought they to be told not to find the fact, though proved, because some other fact, of a felonious nature, occurred afterwards? Would not this be rather a ground for the discretionary interference of the Court?] At all events, if the cases cited are not distinguishable from the present, they are also not distinguishable from *Regina v. Neale*, 1 Denison C. C. 36, and are overruled by it. That was an indictment, under stat. 9 G. 4, c. 31, s. 17, for a misdemeanor in carnally knowing a girl above ten and under twelve years of age. It was found by the jury that *the prisoner had effected [*937 his purpose against her will; and it was contended that he must be acquitted, as the misdemeanor was merged in the rape. ROLFE, B., reserved the case for the Judges; the prisoner was convicted; and the Judges held the conviction right.

The objection made in arrest of judgment is understood to be the same with the objection already noticed. [Allen, Serjt. The objection to the third count is, that no offence is stated, because it is not alleged that the materials dyed did not belong to the defendants; and, to the fourth count, that no duty in the defendants not to employ the dye for their own profit is alleged.] The answer to the first objection is, that the allegation of a conspiracy by the defendants to dye materials, neither belonging to themselves nor intrusted to them by their master for that purpose, is complete, and that the supposed omission occurs in the allegation of an overt act, and is therefore immaterial: to the second objection, that the duty attaches, not only by the express words of stat. 17 G. 3, c. 56, s. 17, but by the general law of master and servant.

Allen, Serjt., and Huddleston, contra. As to the misdirection. The Judge should have told the jury that a felony was proved, and that the indictment for the misdemeanor, therefore, could not be sustained. If the defendants received the goods for their master in the course of their duty, and then appropriated them, this would constitute an embezzlement: but the case for the prosecution was that the defendants had no right to take the goods at all, the master's permission extending only to the dyeing the goods of the defendants themselves. The larceny, on this evidence, *was as complete as if the defendants had appropriated a vessel containing the dye. Now, although an indict- [*938 ment for misdemeanor is not defeated by merely a fact appearing in the course of the proof which substantiates a felony, yet, if a felony is necessarily involved in the act charged, and the proof is only of that which makes the felony, there can be no conviction for a misdemeanor. In *Bex v. Cross*, 1 Ld. Raym. 711, the defendant was indicted for a misdemeanor in knowingly receiving stolen goods; and the judgment was arrested, because, under stat. 8 W. & M. c. 9, s. 4, a party so receiving

was guilty of felony as accessory after the fact. The same law appears in Foster's Crown Law, 373, Disc. iii., c. 3, s. 6. In *Procter v. Darnbrook*, Hob. 128, a suit was commenced in the Star Chamber against several for a riot: and, it appearing that a murder had probably been committed, the Court refused to proceed till a bill had been preferred at the assizes for felony; and, if such bill were not found, the suit was to be heard: and it is true that, if there be an acquittal for the felony, there may be an indictment for the misdemeanor. The language of BULLER, J., in *Isaac's Case*, 2 East P. C. 1031 (c. 21, s. 8), cited on the other side, distinctly shows that, where that which is charged as a misdemeanor is identical with a felonious act, the misdemeanor is "merged;" and the defendant must be acquitted of the misdemeanor. In *Rex v. Story*, Russ. & R. 81, it was clearly taken for granted by the Judges that, if the false pretence amounted to a felonious forgery, the conviction could not be *sustained. That principle was acted on *939] by TAUNTON, J., in *Rex v. Evans*, 5 C. & P. 553, and by PARKER, B., in *Regina v. Anderson*, 2 Moo. & Rob. 469: and *Lutterell's Case*, 6 Mod. 77, is to the same effect. And the law is in effect recognised by stat. 7 & 8 G. 4, c. 29, s. 53, which now prevents the misdemeanor of obtaining by false pretences from being merged in a larceny. It has been asked, whether a jury is to be told to acquit because an offence is proved besides that charged, and whether one offence is to be purged by another: but the offenders do not escape punishment; they only receive more; and the principle for which the defendants contend applies only where there is no proof of the offence charged except that which simply establishes the felony. If it did not prevail, a prisoner might be twice tried for the same act, because an acquittal or conviction on indictment for the misdemeanor would not support a plea to the felony of autrefois acquit or autrefois convict. Now here no proof was given of any conspiracy, except by showing that the defendants joined in the overt act: if, therefore, the overt act be a felony, there is no proof of anything besides the felony. If parties were indicted for a conspiracy to commit murder, and the evidence showed only the joining in the murder, but no previous concert, the misdemeanor would merge in the felony. The reason of the judgment in *Regina v. Neale*, 1 Den. C. C. 36, is not reported: it seems, however, that it may be supported on a ground not applicable to the present case, inasmuch as the proof establishes the commission of two distinct offences, the statutable misdemeanor and the felony, and the defendant was not entitled to be acquitted of *the *940] one because he had committed the other: whereas here the proof is of a larceny only. [PATTERSON, J. The age of the girl was no ingredient in the crime of rape.] That is so: the state of facts on which the two indictments would be founded is not the same; the averment of identity requisite to a plea of autrefois acquit, according to 4 Hawk. Pl. C. 813, B. ii., c. 35, s. 3, could not there be supported.

[ERLE, J. Do you say that the defendant, in *Regina v. Neale*, might afterwards have been convicted of rape?] He might. [ERLE, J. If he had been first convicted of the rape, could he afterwards have been convicted of the misdemeanor?] He could not, because the rape includes the fact charged as a misdemeanor, though not vice versâ. The rape is a common law offence: the misdemeanor is the creation of statute.

As to arresting the judgment. The third count does not show that the goods which the defendants dyed were not their own; and it appears by the record that they had permission to dye their own goods. The allegation of the conspiracy has indeed the word "unlawfully:" but that does not aid; that word occurred in *Regina v. Peck*, 9 A. & E. 686, where the indictment was held bad. [ERLE, J. The allegation is that the defendants conspired to use the vats, &c., in dyeing materials not belonging to themselves. Lord DENMAN, C. J. If there be a good charge of conspiracy, it does not signify that the overt acts charged are perfectly innocent.] They explain and qualify the conspiracy; *Rex v. Seward*, 1 A. & E. 706. It is true that sect. 17 of stat. 17 G. 3, c. 56, authorizes a summary conviction of persons who, being *employed as journeymen dyers, dye any materials without the consent of [*941 their masters, and it may be said that here is a charge of a conspiracy to do the act so made unlawful. But that statute is repealed by stat. 6 & 7 Vict. c. 40, s. 1. [Sir F. Thesiger. Not as to dyers.] So much "as relates to the woollen, linen, cotton, flax, mohair and silk manufactures." [ERLE, J. Sect. 84 confines the act to the manufactures; it does not include dyeing.] It would seem that every process relating to such manufactures is included. Besides, the word "wilfully," which is in stat. 17 G. 3, c. 56, s. 17, is not introduced into the description of the conspiracy. The word "unlawfully," there used, is not equivalent to "wilfully;" *Rex v. Ryan*, 2 Moo. C. C. 15. Further, the same section applies only where the employment is in the dyeing of certain articles there enumerated; but the indictment alleges no such employment, nor that Lewis carried on the trade of dyer of such articles. The fourth count is founded entirely on the relation of master and servant: but it discloses no violation of the duties resulting therefrom: it does not show that the defendants were servants at the time of the conspiracy. Nor does it aver that the conspiracy was to obtain profit by defrauding Lewis: they may have meant to pay for the use of the implements, &c. Neither count concludes *contra formam statuti*. The overt acts will not aid, unless they show enough, when combined with and explaining the charge of conspiracy, or as independent statements of offences, to establish a crime; *King v. The Queen*, 7 Q. B. 795. The word "wilfully" is omitted, as in the third count. The word "fraudulently" does [*942 not supply the defect, any more than "unlawfully;" 1 Burn's Justice, 973 (29th edit.), tit. *Conviction*, s. 1, *Fletcher v. Calthrop*, 6 Q. B. 880, 889.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (May 2d), delivered the judgment of the Court.

The indictment charged that the defendants, being in the employ of the prosecutor, a dyer, conspired to use the dyeing materials on articles not intrusted to them for dyeing, and not belonging to themselves or their families, and so to defraud their employer of profit.

The evidence showed that the prosecutor permitted his servants to dye any articles belonging to themselves or their families, but not things belonging to others; and that the defendants had taken in articles not belonging to themselves or their families, and had dyed them for profit with the materials of their employer, and passed them off for articles within the prosecutor's permission.

Several objections to the indictment and the evidence were made at the trial, and in support of the rule for arresting the judgment or for a new trial,^(a) and have been disposed of.

But the objection that the misdemeanor charged formed part of a felony, and was merged therein, and that therefore either the judgment should be arrested or a verdict of acquittal entered, was reserved for consideration.

*948] With respect to arresting the judgment, it is clear that the essential part of the indictment is the charge of a conspiracy; so that, if the evidence proved the conspiracy, and did not prove the overt act alleged, viz. : that the conspiracy was carried into effect, the indictment would have been sufficiently proved. The point, therefore, is not raised by the indictment.

With respect to the evidence, we do not propose to examine the correctness of the opinion of the learned Judge at the trial, that it did not prove a larceny, and that it tended rather to prove the obtaining of goods by false pretences than theft. But, assuming that the evidence to prove the conspiracy would have been sufficient to warrant a conviction upon a charge of larceny against principals and accessories, and that the point contended for by the defendants' counsel was raised, we have to decide, whether the defendants had therefore a right to claim a verdict of acquittal.

The main reliance was placed on *Rex v. Cross*, 1 *Ld. Raym.* 711, where the defendant was convicted of a misdemeanor in receiving stolen goods knowing them to have been stolen, and the Court decided to arrest the judgment, because the offence was a felony created by stat. 3 *W. & M. c.* 9, s. 4, and is not indictable as a trespass: and *HOLT* adds: "it would have been the same at common law, because this fact would have been good evidence of having been accessory to the felony after the fact at common law." But this case is irrelevant to the present question, which arises only in respect of felonies composed of a series of acts where a part of the series is a complete misdemeanor. The receipt of

^(a) See p. 933, note (a), *ante*.

*stolen goods knowingly does not of necessity comprise any series of acts: on the contrary, that offence is not committed at all unless the receipt and the knowledge are simultaneous; in which case, by the common law, they might be evidence of defendant's assisting a felon, and so of being guilty of a felony as an accessory after: and, by the statute then in force, those facts constituted a felony: the offence was a felony, and a felony only; and therefore an indictment charging it to be a misdemeanor was held wrong in law. The case does not show that a criminal who has been guilty of a complete misdemeanor, and also of a felony comprising the misdemeanor, may set up his felony as a bar to the prosecution for the misdemeanor. [*944]

The case of *Proctor v. Darnbrook*, Hob. 138, gives no support to the defendants' case, but serves to explain the principle upon which judges have acted in the exercise of their discretion in some cases of misdemeanor. The plaintiff was suing the defendants in the Star Chamber for riots and for felling of woods; and his proof went to show that the defendants, in the course of their riotous acts, had committed murder: and the Judges think it fit that the plaintiff should prefer a bill for murder to the grand inquest, and adjourn the further hearing of the plaintiff's suit for the riots till the question of murder should be disposed of by the proper tribunal. The jurisdiction here exercised by the Judges of the Star Chamber is exercised now by justices of oyer and terminer, who may direct one indictment to be quashed or suspended and another preferred, as public justice may require. But the Court, by making the plaintiff *prosecute for the felony before he went on with his suit, gave no sanction to the notion that the defendant has any right [*945] so to interfere, and to demand an acquittal for a manifest minor offence, upon the pretext that he has a right to direct himself to be prosecuted for a graver crime. The passage cited from Foster's Discourse iii., c. 8, s. 6 (p. 378), relates solely to the offence of knowingly receiving stolen goods: and the observations above made upon *Rex v. Cross*, 1 Ld. Raym. 711, apply equally to show this passage to be irrelevant here.

In *Isaac's Case*, 2 East's P. C. 1081 (c. 21, s. 8), the prisoner was indicted for the misdemeanor of setting fire to his own house, whereby adjoining houses were endangered of being burnt. The evidence was that he had set fire to his own house to defraud the insurance company, and that the adjoining houses had been burnt down. The Judge directed an acquittal for the misdemeanor, stating that upon these facts the prisoner was guilty, if at all, of felony. By the law at that time the mere setting fire by a man to his own house was no offence: but, if his house was so situate that other houses were endangered, it was a misdemeanor, being in the nature of an attempt to set them on fire. If they were burnt it was a felony; it was a setting fire to them, every man being taken to intend the obvious consequence of his act. (See the cases in 2 East's P. C. 1027, c. 21, s. 7.) The learned Judge who directed the

acquittal may have considered that the crime of arson consists in the one act of setting fire unlawfully, and that, after the fire has been so set, the party is responsible for its progress until it is extinguished, and that the progress decides whether such *setting on fire is a felony or mis-
 *946] demenor, and that a prisoner who has committed a felony and no other offence, cannot properly be charged with the misdemeanor of an attempt to commit it : and also he may have considered that public justice required a more signal example in a case of such guilt. On both or either of these grounds the case is distinguished from the present. In *Rex v. Evans*, 5 C. & P. 558, and *Regina v. Anderson*, 2 Moo. & Rob. 469, the misdemeanor of obtaining goods by false pretences was charged ; and the evidence showed the false pretence to be a felony, namely, the uttering of a forged instrument. In the first case the Judge, in the last the prisoner, objected that, as the evidence thus showed a felony to have been committed, therefore the charge of misdemeanor failed ; and two Judges supported the prisoner's objection, declaring that the proper way of proceeding was by indictment for felony. It is clear that, if a misdemeanor is by statute made a felony, the indictment ought to be for felony : and these cases may have been taken to come within this rule ; the first step in the misdemeanor charged being created a felony : and, if so, they are here irrelevant. But it should be observed that the misdemeanor of obtaining goods on false pretences consists of a series of acts, the false pretence and the obtaining of the goods, and that the first step in the series may also be a felony. Where that is the case, there appears no reason why the prisoner should be allowed to defeat the charge of the lesser offence by alleging his own guilt in respect of the greater offence. The same act may be part of several offences ; the same blow may be the
 *947] subject of *inquiry in consecutive charges of murder and robbery ; the acquittal on the first charge is no bar to a second inquiry where both are charges of felony ; neither ought it to be where the one charge is of felony and the other of misdemeanor.

These being the authorities cited for the defendants, there appears none direct in their favour ; and there is a direct decision against them in *Regina v. Neale*, where a charge of misdemeanor in having intercourse with a female child between the age of ten and twelve was held proved, and the conviction maintained by the Judges, although the evidence showed that the very act charged as a misdemeanor was also the felony of rape ; the argument for the prosecution being that every material allegation of the indictment was proved, and that the verdict ought to be according to truth. This is a direct adjudication, that a misdemeanor which is part of a felony may be prosecuted as a misdemeanor though the felony has been completed : and the attempt, on the argument, to make a distinction between misdemeanors by statute and those by common law, was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it was derived.

It was further urged, for the defendants, that, unless this defence was sustained, they might be twice punished for the same offence; but this is not so, the two offences being different in the eye of the law. If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the Court to apportion the sentence for the *felony with reference to such former conviction. If the [*948 position contended for by the defendants was true, its application would be subject to much uncertainty; for it is not within the province of the judge in general to decide on the credibility of the witnesses, or the weight of the facts tending to prove a felony. But, according to the present contention, the duty of acquitting on his own opinion is cast upon him; and this conclusion of fact, in which probably the jury would not have concurred, is to be subject to no review. Also, if he should be satisfied that a felony is proved, and should direct an acquittal for the misdemeanor, it is obviously uncertain whether the same evidence would be given upon a prosecution for felony, or would be satisfactory to the jury, or would be left without answer. The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretence: and entire impunity has sometimes been obtained by varying the description of the offence according to the prisoner's interest: he has been liberated on both charges, solely because he was guilty upon both.

Upon this review, we are of opinion that this conviction for a misdemeanor ought to be sustained, although the evidence proving it proved also that it was part of a felony, and that such felony had been completed.

Rule discharged.(a)

(a) The argument against the rule is reported by H. Davison, Esq.

*POLLITT v. JAMES FORREST and Three Others, and [*949
WALSH. [Jan. 14, 1847.]

(Error from the Common Pleas, LANCASTER.)

Avowry: that plaintiff held and enjoyed the locus in quo as tenant to defendants, under a demise thereof to plaintiff theretofore made upon and subject to certain rents, provisions, conditions, and stipulations, that is to say, that plaintiff should not, during the said tenancy, sell any hay, produced upon the premises during such tenancy, off the said premises, under the penalty of 2s. 6d. per yard of the hay sold as aforesaid, to be recovered by distress as for rent in arrear. Averment that plaintiff, during the tenancy, sold 800 yards of hay contrary to the said provisions and stipulations, by reason whereof a sum, &c., at the rate of 2s. 6d. per yard, became due, &c., and recoverable by distress. Plea in bar, Non tenuit. Verdict, that plaintiff did hold and enjoy in manner, &c.: and that the value of the distress was 99l., and the arrears were 54l. Judgment, under stat. 17 Car. 2, c. 7, that the defendants recover 54l. and costs.

On error to the Court of Queen's Bench,

Admitted that, if the 2s. 6d. per yard was a penalty, judgment under stat. 17 Car. 2, c. 7, was erroneous.

Held by the Court of Queen's Bench: That a sum payable nomine pœne for selling hay contrary

to agreement between landlord and tenant, the amount being measured by the quantity of hay sold, might be a rent-service.

That the avowry, as here pleaded, might be taken as setting out the terms, and not the mere legal effect, of the instrument of demise.

That the instrument, as stated in the plea, either created a rent-service or was a grant with license from the grantee to the reversioner to distrain as for a rent; and, *semble* that it had the latter effect. And

Held that, in either case, the defendants had rightly pleaded that they distrained as for a rent. Judgment affirmed.

On error to the Exchequer Chamber. Held by that Court: That the agreement must be considered as set out according to its legal operation.

That the legal operation was to create a penalty, recoverable by distress as for rent, but not a rent. That the avowry, therefore, was imperfectly pleaded. But,

Semble, that it was sufficient after verdict, as it might have appeared in evidence that the plaintiff had granted, under seal, a penalty to be levied by distress, or, if he held from the defendants themselves, that he had given them a license to enter and distrain in the case which had occurred.

But, Held that the judgment, given under stat. 17 Car. 2, c. 7, could not stand, the distress not being for a rent.

The Court reversed the judgment, and gave no other. For, on error brought either by plaintiff or by defendant below, the Court of Error, if the judgment be found erroneous, may give a right judgment for the plaintiff in error; but not against him.

REPLEVIN for cattle and goods, &c.

Avowry and cognisance. That plaintiff, before the time when, &c., to wit, on, &c., and for a long time, to wit, &c., then last past, and from thence to the time when, &c., held and enjoyed a messuage, farm, &c., of *which the locus in quo was parcel, as tenant thereof to the *950] said James Forrest, &c. (the first four defendants), "under and by virtue of a certain demise thereof to plaintiff theretofore made upon and subject to certain rents, provisions, conditions, and stipulations, that is to say, amongst other things, that the plaintiff should not nor would, during the continuance of the said tenancy, sell any hay, produced during such continuance upon the said demised premises, off the said premises, under the penalty of 2s. 6d. for each yard of the said hay so sold as aforesaid, to be recovered by distress as for rent in arrear:" Averment that, during the continuance of the said tenancy, to wit, on, &c., and before the said time when, &c., "plaintiff sold off the said demised premises divers, to wit, 800 yards of hay, the said hay having been theretofore and during the continuance of the said tenancy produced upon the same premises, contrary to the said stipulations and provisions in that behalf: by reason whereof a large sum of money, to wit, 100*l*., being at the rate of 2s. 6d. for each yard of the said hay so sold as aforesaid, before the said time when, &c., to wit, on," &c., "became and was, and from thence to the said time when, &c., continued, due and payable to the said James Forrest," &c. (the first four defendants), "and recoverable by distress as aforesaid." Avowry, and cognisance by Walsh, "as for and in the name of a distress for the said sum so due and in arrear and so recoverable by distress as aforesaid, and which still remains due and unpaid." Verification, and prayer of judgment and a return, &c., with their damages, &c.

Plea in bar. That plaintiff did not hold or enjoy the said messuage, farm, &c., as tenant thereof to the said *James Forrest, &c., [951 under the said supposed demise, &c., in manner and form, &c. Conclusion to the country. Issue thereon.

The record then stated a venire to the Court of Common Pleas for Lancaster, trial of the cause at the assizes, and verdict that the plaintiff did hold and enjoy, &c., in manner, &c. "And the jurors aforesaid, at the prayer of the defendants, according to the form of the statute in such case made and provided, having proceeded to inquire concerning the sum so due and in arrear and so recoverable by distress as aforesaid, and the value of the cattle, goods, and chattels distrained, upon their oath aforesaid, say: That the sum so due and in arrear, and so recoverable as aforesaid, was 54*l.* 7*s.* 6*d.*; and that the cattle, goods, and chattels distrained were of the true value of 99*l.* Therefore it is considered that the plaintiff take nothing by his aforesaid writ, but that he and his pledges to prosecute be in mercy, &c. And that the defendants do go thereof without day, &c. And it is also considered that the defendants recover against the plaintiff the said sum of 54*l.* 7*s.* 6*d.*, being the amount of arrearages by the jurors aforesaid in form aforesaid found: and also 106*l.* 5*s.* 9*d.* by the Court here adjudged to the defendants, and with their assent, for their costs and charges by them laid out about their defence in this behalf, according to the form of the statute in such case made and provided: Which said arrearages, costs, and charges amount in the whole to," &c. "And that the defendants have execution thereof," &c.

Error was brought in this Court. The errors specially assigned, and relied upon in the argument, were: That the avowry and cognisance and matters therein *contained are not sufficient in law for the [952 defendants to have judgment and a return, &c. Also that the defendants avow and make cognisance on the ground of a distress for a penalty. Also that the defendants avow, &c., on the ground aforesaid, without alleging or showing any deed or instrument under seal authorizing such distress. And that the sum for which the distress is said to have been made is not shown to have been a rent of any kind. Joinder in error.

The writ of error was argued in Easter term, 1846.(a)

Atherton, for the plaintiff in error (plaintiff below). First, the defendants have shown by their avowry that they distrained for a penalty, not a rent; (b) and they are concluded from alleging the contrary. Where

(a) April 28th. Before Lord DENHAM, C. J., WILLIAMS and COLERIDGE, Js.

(b) *Atherton* stated that a motion in this case, for judgment non obstante veredicto, or to enter a verdict for the plaintiff, had been made, by mistake, in the Court of Exchequer, which Court had thought that the parties had intended to agree for an additional rent, but that the avowry showed an agreement for a penalty; therefore a rule had been there granted for judgment non obstante veredicto, unless defendants would amend the avowry, in which case there was to have been a new trial.

a party pleads the contents of an instrument without setting them out in *hæc verba*, it will be taken that he alleges them (as he ought to do) according to their legal effect; *Chester v. Willan*, 2 Saund. 96, and note (2) to that case, (a) and authorities there cited; particularly *Baker v. Lade*, 8 Lev. 291, S. C. 2 Ventr. 149, 260, 266, 4 Mod. 149, Com. Dig. *Pleader* (C 87). It may be said that these passages refer specifically to *953] instruments under seal, and the demise here is not stated to *have been so: but the principle "that a contract or written instrument should be stated according to its legal effect" "applies" "to the statement by either party of contracts and obligations of every description, whether verbal, written, or specialty, in any form of action:" 1 Chitt. Plead. 312, 7th ed. And the rule is treated as indiscriminate in the remarks which follow; pp. 312—314. The necessity of showing the effect of an instrument by express averment is insisted upon in note (5) to *Bennet v. Holbech*, 2 Wms. Saund. 319, and in note (1) to *Rex v. Sutton*, 1 Wms. Saund. 274. The avowry here complies with this rule. A demurrer on the ground that the legal effect of the demise was not stated would have failed. Then, since it appears on the record that the 2s. 6d. per yard was, by this demise, appointed as a penalty, nothing can here turn upon the case, if it should be relied upon, of *Rolfe v. Peterson*, 2 Bro. P. C. 436 (cited in *Chitty on Contracts*, p. 762 (4th ed.), and, by ALEXANDER, C. B., in *Jones v. Green*, 8 Y. & J. 298, 304), where an annual payment of 5*l.* for every acre converted into tillage was considered not to be a penalty. That was upon the construction of the lease itself; whereas, here, the question turns upon the legal effect as stated in pleading.

Then, secondly, if the 2s. 6d. per yard here is a penalty, the judgment is improperly entered up under stat. 17 Car. 2, c. 7, s. 2, for "the amount of arrearages," the avowry not being for a rent. The statute law and practice on this subject are detailed in note (3) to *Mounson v. Redshaw*, 1 Wms. Saund. 195. [*Cowling*, contra, admitted, that, if the sum was a penalty, the judgment was erroneous.]

*954] *Thirdly, assuming that the 2s. 6d. is a penalty, and the judgment erroneous, it might perhaps be contended on the other side that this Court, as a Court of error, might look to the whole record, and give such judgment as the Court below ought to have given. But the Court below could not have given any judgment for the defendants. A penalty, as such, could not have been recovered in an action for damages, since stat. 8 & 9 W. 3, c. 11. Before that act, if a penalty was forfeited, the plaintiff might have taken out execution for the whole; but the statute (providing, by sect. 8, for assignment of breaches and assessment of damages) relieved defendants from that hardship, and limited the plaintiff's recovery to the damage actually sustained, leaving, however, the right of recovery entire where the sum specified in the contract

(a) 2 Wms. Saund. 97 c, 6th ed.

as recoverable on default is not a penalty but liquidated damages: a distinction explained by many cases, among which are *Astley v. Weldon*, 2 B. & P. 346, and *Davies v. Penton*, 6 B. & C. 216. The law on this subject, generally, is laid down in notes (1) and (d) to *Gainsford v. Griffith*, 1 Wms. Saund. 58, 58 b. And, if the 2s. 6d. per yard in this case could not have been recovered in an action, a fortiori it could not be distrained for. Since stat. 8 & 9 W. 3, c. 11, even an express agreement to enforce a penalty in this way would not be binding: for the Courts will not allow parties, though by mutual consent, to violate the letter and spirit of the law. By the remedy of distress, "a man is allowed," as Blackstone says, 3 Comm. 6, "to be his own avenger, or to minister redress to himself." Such a license is against general principles, and not to be *extended by the voluntary act of individuals. [COLERIDGE, J. You rely upon the word "penalty" [*955 here, as having certain legal consequences, and reject all the context.] There is nothing that conflicts with the ordinary understanding of the word. [COLERIDGE, J. "As for rent in arrear."] That means, with the incidents of a distress for rent; it does not imply that the penalty itself is a rent. One incident of such a distress is that the goods of a stranger on the premises may be seized: parties cannot, between themselves, attach such an incident as that to a penalty. If the power to distrain could in any case originate from the mere act of parties, there is no instance of its being conferred without a deed. Littleton, sects. 218 et seq., defines three kinds of rent. To the first, rent service, power of distress is incident as of common right. If a man, by deed indented, makes a gift in tail, or lease for life, with remainder in fee, or a feoffment in fee, reserving to himself and his heirs a rent, that reservation, if with power to distrain, is a rent-charge; if without such power, a rent seck; ib. sect. 217. The quality of the rent, in the two latter cases, depends upon the instrument under seal; and parties cannot, by mere agreement, annex the incident of distress to what would else be a rent seck. In *Chapman v. Beecham*, 3 Q. B. 723,(a) which may be cited on the other side, there was an instrument under seal; and the power to distrain, set up by the avowry, seems to have been considered only as a leave and license informally pleaded. A license might be revoked before it could cause serious injury; but here the right of distress is pleaded as an irrevocable power. *The operation of [*956 a consent between parties has well known limits: it cannot give jurisdiction, or power of imprisonment. If the present avowry be good, power of distress may be made incident to any contract. [COLERIDGE, J. A man may give a power of attorney to enter up judgment and seize all his goods.] There the authority of a Court is interposed.

Cowling, contra. The avowry is good, at least after verdict. Though

(a) In the marginal note there, last line but 4, for B. read C., and for C. read B.

informally expressed, it shows with sufficient certainty the reservation of a rent-service. A rent-service is an annual return, in money, or otherwise, by way of "retribution for the land," and "may be reserved upon every conveyance that passeth any estate to the tenant," *Gilbert on Rents*, 9, 26: and no precise words are necessary for the reservation; only "it must be reserved by such words as imply a return of something that was not in the grantor before, in lieu of the land given; and therefore reddendo, reservando, solvendo, inveniando, and such like, are proper words," &c., *Gilb. Rents*, 80: and examples are there added. In *Butt's Case*, 7 Rep. 23 a, 24 a, it is said: "If I grant unto you, that you and your heirs shall distrain for a rent of 40s. within my manor of S., this, by construction in law, shall amount to a grant of a rent out of my manor of S.; for if it should not amount to a grant of a rent, the grant should be of little force or effect, if the grantee should have only a bare distress, and no rent in him." That, it may be said, is the case of a rent-charge. But in *Daniel v. Gracie*, 6 Q. B. 145, where the plaintiff in replevin held a marl pit, which he had agreed (without writing) *to take, and to pay, on the usual quarter days, 8d. per solid *957] yard of the marl gotten, this payment was held to be a rent. The amount was uncertain, but was capable of being ascertained; and that, according to *Gilb. Rents*, p. 10, made it sufficiently definite. [Lord DENMAN, C. J. There nothing by way of rent was reserved, except the 8d. per yard. COLERIDGE, J. How does the payment in this case appear to be a compensation for holding the land?] The context of the agreement must be looked to. [COLERIDGE, J. Does every provision to enforce a particular mode of cultivating, or of managing the manure, by liability to payment, constitute a rent?] If the sum is ascertainable. The holding here is said to have been subject to certain "rents;" and, if the following words, "provisions, conditions, and stipulations," be passed over, the "penalty" appears clearly to be a rent. At least the Court will so construe it after verdict. [COLERIDGE, J. It is clear that we have not the whole instrument before us. From what is given, why are we to pick out the word "rents," and neglect those that follow?] The subsequent ones are merely vague and ambiguous.

It is argued, on the other side, that the defendants must be taken to have set out the demise according to its legal effect, and are therefore strictly bound to the statement; and that they have described this payment as a "penalty." In one sense, a penalty, as spoken of here, is not a rent; but the object evidently has been to create a penal or increased rent; and this may be so regarded, consistently with the words used. [COLERIDGE, J. If the sum per yard had been 50L., could the defendants have distrained for the whole?] They could; because the *958] sum, however styled, is in the *nature of liquidated damages. This view is supported by note (d) to *Gainsford v. Griffith*, 1 Wms. Saund. 58 c. The construction must be such as will, substantially, ac-

comply the intent; note (1) to *Chester v. Willan*, 2 Wms. Saund. 96 b: and the Court will be astute in reconciling the construction with the intent; *Earl of Clanrickard's Case*, Hob. 273, 277. In *Baker v. Lade*, 3 Lev. 291, S. C. 2 Vent. 149, 260, 266, 4 Mod. 149, referred to on the other side, there was no averment positive enough to warrant the Court in pronouncing an opinion; the supposed grant, by covenant to stand seised, did not appear on the pleading. The present is, at most, only the case of a title imperfectly alleged, but sufficiently well after verdict. Secondly, if the judgment is in part erroneous, it is also good in part, whether the power reserved be good as a power of distress or not; for the grievance, in replevin, is the taking; that alone requires to be justified; 19 Vin. Abr. 22, tit. *Replevin* (A. a, pl. 8); the pleadings here show enough to justify taking; and, so far, the defendants were entitled to judgment. Thirdly, if the Court here is to pronounce any judgment, it can be only to arrest the judgment below; there cannot be judgment non obstante veredicto, as for a plaintiff, because, in replevin, both parties are in a manner plaintiffs: Com. Dig. *Pleader* (3 K 14), *Freeman v. Jugg*, 3 Salk. 307, *Allen v. Darby*, 1 Show. 99, *Morrice v. Golder*, Carth. 437.

Atherton, in reply. The agreement pleaded is inconsistent in its nature with the supposition of a rent service. "Conditions and stipulations" cannot be struck out: there must have been others than * [959 the one particularly specified. In *Daniel v. Gracie*, 6 Q. B. 145, the question did not arise upon a statement on record of the legal effect of an agreement. *Randal v. Everest*, Moo. & M. 41, *Davies v. Penton*, 6 B. & C. 216, and *Kemble v. Farren*, 6 Bing. 141, show how unwilling the Courts have been to construe the words of parties as fixing liquidated damages, and so excluding the relief which the law gives against penalties. Arresting judgment is not the office of a Court of error, but of the Court where the action is brought. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

This was a writ of error from the Common Pleas at Lancaster. The action was replevin. The issue was on a demise alleged in the avowry, and was found for the defendants. The causes of error assigned are substantially two; one arising on the insufficiency of the avowry, the other on the form of the judgment. The avowry states a demise "subject," &c. (His Lordship read the words of the demise, as stated, ante, p. 950.) It then alleges sale of hay; the accruing due of a large sum at 2s. 6d. per yard; the non-payment of, and distress for, the same. The demise only being traversed, and found for the defendants, they have proceeded as under stat. 17 C. 2, c. 7; at their prayer the jury have found the arrears due and the value of the distress; and, the latter exceeding the former, the verdict has been taken for the former sum and the costs.

The plaintiff contends, first, that the 2s. 6d. per yard is a penalty,

*960] and not a rent service. Secondly, that *the right to distrain is insufficiently granted by instrument not under seal. Thirdly, that, if it be a penalty, and the right to distrain well granted, still the case is not within stat. 17 C. 2, c. 7, and the judgment, therefore, founded on proceedings according to it, erroneous.

There is no doubt that an agreement not to sell off the premises any of the hay made on them touches and concerns the thing demised: it is (to use the words of WILMOT, C. J., in *Bally v. Wells*, *Wilmot's Notes*, 341, 350), "laying down a rule" (so far as it goes) "how and in what manner the 'thing demised' shall be managed;" for the object and effect of it is to procure the spending of the hay on the premises, and so the making of manure for their better cultivation. Such an agreement as this might well be enforced by the payment of an increased rent nomine pœnæ; and such rent might have been measured by the quantity of hay sold, as, in the case of ploughing up old pasture land, it is commonly done by the quantity ploughed; and it might have been made payable instantly on the breach by sale. Further, if all this had been done in terms, we see no reason why such a rent would not have been a rent service, and distrainable for, on non-payment, as of common right.

The question, therefore, will be whether the allegations of this avowry may or may not be taken, both by the consent of the parties and their legal effect, to amount to what we have just stated: and, on consideration, we think they may. The demise here must be taken to have been by agreement not under seal: it was open, therefore, to the defendants to plead it according to its legal effect, or in its very terms. The proper *961] *understanding of it appears to us to be that it is pleaded in its terms; and then it will be for the Court to determine on their legal effect. Now there is no difficulty in holding that they amount to an agreement not to sell the hay off the premises, and to pay a rent at the rate of 2s. 6d. per yard of all hay sold in breach of the agreement, the amount of which will become certain by reference to the quantity sold: and, as no time is mentioned at which it is to become payable, the law will imply that it becomes payable when the right to it has arisen; that is, on the sale of the hay. Further, they agree that this shall be recovered by distress as for rent in arrear; that is, that it shall be treated as such as to that mode of recovery. If this be a rent and a rent service, it is admitted that there is no error: but, supposing it to be the former and not the latter, and, therefore, that some special grant of the power to distrain was necessary, we think the instrument, as here pleaded, was sufficient for the purpose, though not under seal.

The argument on the part of the plaintiff was founded on the notion that this was in the nature of a rent-charge. We think it is rather a license by the tenant to the landlord in whom the reversion is remaining. *Chapman v. Beecham*, 3 Q. B. 728, was cited by the plaintiff, in which a covenant for the payment of interest was secured by a power to enter

and distrain in case of non-payment. There, undoubtedly, the power was given by deed; the same instrument which contained the covenant to pay the interest. But no stress was laid on that circumstance, either by the counsel or the *Court: on the contrary, by the latter it [*962 was treated merely as a license.

As we hold that the subject-matter distrained for was a rent, the proceedings were properly under the statute of Charles; and the third point does not arise.

Our judgment therefore will be for the defendants in error.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

POLLITT v. JAMES FORREST and Three Others, and WALSH.

For syllabus, see p. 949, ante.

ERROR was brought in the Exchequer Chamber on the above judgment. The grounds of error specially assigned, and relied upon in argument, were those before stated: and that, supposing the avowry to show a good cause for a distress, still the judgment ought to have been as at common law, and not under stat. 17 Car. 2, c. 7. Joinder in error. The writ of error was argued in Hilary vacation, 1848.(a)

Atherton, for the plaintiff in error (plaintiff below), re-argued the points made in his argument in the Court of Queen's Bench. In addition to authorities there mentioned, he cited, as to the nature of a penalty, Lord *MANSFIELD's judgment in *Bird v. Randall*, 8 Burr. 1345, 1351. As to the means of enforcing it, *Nedriffe v. Hogan*, [*963 2 Burr. 1024, where it was held that a penalty cannot be set off. And, as to the distinction between a penalty and liquidated damages, *Horner v. Flintoff*, 9 M. & W. 678. As to distress for rents, *Littleton*, sect. 240,(b) with the sections before cited.

Cowling, contra, in support of the argument that a liquidated sum, and not a penalty, was reserved by this demise, cited the judgment of Lord MANSFIELD in *Lowe v. Peers*, 4 Burr. 2225, 2228, 2229, and *Green v. Price*, 13 M. & W. 695.(c)

He also contended that the Court was not precluded by the terms of this avowry from holding, in conformity to the verdict, that the 2s. 6d. per yard was reserved as a rent service. [PARKER, B. It does not

(a) February 1st. Before PARKER, ALDERSON, ROYCE, and PLATT, Bcs., and CRESSWELL and R. V. WILLIAMS, Jcs.

(b) See the comment, Co. Litt. 162 A.

(c) Judgment of Exch. affirmed in Exchequer Chamber, *Price v. Green*, 16 M. & W. 346.

appear that the avowants were the original parties to the demise, and have the reversion.] That may be assumed after verdict. If the avowry is for rent service, the generality of expression is no greater than stat. 11 G. 2, c. 19, s. 22, allows in such cases. The demise is stated to be subject to "certain rents," "that is to say," &c. : even on general demurrer, this language would be deemed sufficient to express a tenure by rent service. A party pleading a deed does not necessarily undertake to set forth its legal effect, as appears from the judgment of ABBOTT, C. J., in *Moore v. The Earl of Plymouth*, 3 B. & Ald. 66, 69. And, supposing that the defendants here were obliged to support the avowry as setting
 *964] forth the legal operation of the deed, the only objection would be that the pleading was ambiguous ; which would not be fatal after verdict. But the words "that is to say" imply that the instrument itself is referred to, as explaining the previous mention of "rents ;" and the Court will consider it to be before them for the purpose of this decision, as, in *Rowe v. Young*, 2 Brod. & Bing. 165 (though no verdict had passed), the bill of exchange mentioned in the declaration was argued upon, and its language cited, in the House of Lords, as if the document itself had formed part of the record ; and it was assumed by BEST, J., RICHARDSON, J., and others of the Judges, though the declaration did not so state, that the acceptance contained the words "Payable at Sir John Perring & Co.'s." In *Startup v. Maedonald*, 2 Man. & G. 395, 401, where the question turned upon the operation of a sale-note, TINDAL, C. J., said: "It appears to me that the sale-note must have a reasonable construction, and that a count founded upon that sale-note must have as reasonable a construction as the contract itself." The words, in this avowry, "to be recovered by distress as for rent in arrear," seem inserted pro majori cautela, and do not imply that the sum recoverable is anything but a rent.

He then argued, as before, that, at all events, the taking was justified ; and, on this point, he relied upon *Chapman v. Beecham*, 3 Q. B. 723, contending that no real distinction arose from the power of distress, in that case, having been granted under seal. As to the judgment which this Court might give (an avowant being an actor), he cited *Coas v. Bowles*, Carth. 122, *Darcy v. Langton*, Brownl. & Gold. 183, and the authorities before mentioned.

*965] *Atherton*, in reply. As was observed from the Bench, it does not appear by this record that there is any person qualified to enforce a rent service, as reversioner : therefore, according to the principle laid down in Litt. s. 215, the distress cannot be grounded on that claim, even if the declaration be supposed to embody the grant relied upon. If there be a rent, it may be only a rent seck. But the claim here is, substantially, of a "penalty." If the term "rents" is important, the declaration is not ambiguous, but repugnant, and the word to be rejected is "rents," and not "provisions," "conditions," or "stipulations." The statement here is not aided by stat. 11 G. 2, c. 19,

s. 22; for the language of that clause is not followed, nor the title alleged even so far as is there required. Nor does the verdict assist; for the jury must be understood to have found that the plaintiff held subject to a penalty. [WILLIAMS, J. No; the finding would be only that he held *modo et formâ*.] It is argued that a taking at least is justified; but the taking cannot be divested of its peculiar character and incidents, those of a distress. The plaintiff is entitled to judgment, whatever difficulty may be suggested as to the form. *Cur. adv. vult.*

PARKS, B., in this term (May 2d), delivered the judgment of the Court.

This case comes before us on a writ of error from the Court of Queen's Bench, affirming a judgment of the Court of Common Pleas at Lancaster in an action of replevin. The principal question argued before us was as to the sufficiency of the avowry, after verdict for the defendant on the plea of *Non tenuit*. The avowry *alleged that the plaintiff, [*966 before and at the time when, &c., held the lands of which the locus in quo was parcel as tenant to the avowants under and by virtue of a certain demise thereof to the plaintiff theretofore made upon and subject to certain rents, provisions, conditions, and stipulations, that is to say, amongst other things, that the plaintiff should not nor would, during the continuance of the said tenancy, sell any hay, produced during such continuance upon the said demised premises, under the *penalty* of 2s. 6d. for each yard of the said hay so sold as aforesaid, to be recovered by distress *as for* rent in arrear. There was a plea of *Non tenuit*; and the verdict was for the defendant, and judgment thereon, not *pro retorno habendo*, but under the statute 17 C. 2, c. 7. On a writ of error, the Court of Queen's Bench affirmed the judgment.

On the writ of error to this Court, it was argued that the judgment so affirmed was erroneous, that it could only be supported on the ground that the sum distrained for was a rent service, and that on this record it could not be taken to be such. And we are of that opinion.

We must assume that the legal effect of the terms under which the plaintiff held is set out: and, if so, the sum payable is a *penal* sum, by way of punishment for not spending the produce on the land; to be recovered indeed by distress in the same way as a distress is made for rent in arrear, but not being itself rent. We have little doubt that, if the whole instrument was before us, containing the terms of the holding, it would appear that the parties intended the sum to be paid as additional or penal rent: but on the record we must assume that the legal effect is set out, *and take it to be, as the defendant has pleaded it, a *penalty*. If it is so taken, the defendant had certainly no right [*967 to avow in the general form given by stat. 11 G. 2, c. 19, which applies to rents only. A penalty is not a rent, as a *nomine pœnæ* is not a rent within stat. 82 H. 8, c. 37, Co. Litt. 162 b: but, after verdict upon the issue whether he held on the condition that he should pay a *penalty*, we

should probably hold that it must be presumed that it was proved on the trial either that he had granted, by an instrument under seal, this penalty to be levied by distress, or that, if the plaintiff held by a demise from the defendants themselves, he had given a license to enter and distrain his own goods for it. Whatever was legally necessary to make the plaintiff hold at the time of the distress under the penalty so claimed must be presumed to have been proved. Thus the grant of an advowson or *reversion*, though not pleaded to be by deed, is good after a verdict on non concessit; for a deed must have been proved: and so a grant of a rent-charge where it is not said to be by deed is good after a similar issue; *Lightfoot v. Brightman, Hutton, 54.*

We should probably hold, therefore, that the avowry was good after verdict, if we could give the defendant judgment on this writ of error. But, as the judgment has been given not at common law but under stat. 17 C. 2, c. 7, which applies to distresses for rents only, it remains to consider what course is to be pursued. As the judgment is erroneous in its present shape, it is clear it must be reversed: but is the Court simply to reverse it, or give judgment for the defendants for a retorno habendo at common law? The rule used to be, *as laid down by *968] the Court of King's Bench in the case of *Parker v. Harris, 1 Salk. 262*: "where judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment, for the suit is only to be eased and discharged of that judgment: but where the plaintiff brings error, the judgment shall not only be a reversal, but the Court shall also give such judgment as the Court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given:" and the rule is given in similar terms by Lord MANSFIELD in *Cuming v. Sibly, 4 Burr. 2489, 2490*. But in the case of *Gildart v. Gladstone, 12 East, 668*, the previous cases were considered; and the Court held that they were bound ex officio to give a perfect judgment on the whole record, and do all the justice to the plaintiff in error to which he was entitled; and, when a verdict had been found, and the Common Pleas had given judgment for the plaintiff, the Court of King's Bench, on a writ of error brought by the defendant, not only reversed the judgment for the plaintiff, but also gave judgment for the defendant for his costs.

This case was considered as having established the reasonable rule, that the Court which has a commission by the writ of error to view and examine the transcript and proceedings, and to cause to be further done thereupon what of right ought to be done, should do complete justice on the whole record to the plaintiff in error, and give the same judgment *969] for him which the Court below ought to have given; and the *distinction above adverted to was thought to be done away with: see

2 Wms. Saund. 101 *cc*, note (i), the note of the learned annotator(a)), and 2 Tidd's Pract. 1179, (9th ed.) But it happened in the subsequent case of *Rex v. Bourne*, 7 A. & E. 58, 67, that the late Mr. Justice LITTLEDALE, a great authority, raised a doubt about the propriety of that decision, though he did not think it necessary to give any opinion upon it. The Court of Exchequer Chamber, in the recent case of *Gregory v. the Duke of Brunswick*, 8 Com. B. 481, gave a good deal of consideration to this question, which, however, they thought it unnecessary to decide. There the plaintiff below brought a writ of error, and objected that judgment for the defendant below, who had succeeded on an issue on some pleas and was entitled to judgment on the whole record, was erroneous, because the Court had omitted to give the plaintiff judgment for the costs of a demurrer to a plea which had been decided to be bad; and the Court held that, as the plaintiff asked to have the judgment reversed and justice done to himself, they ought to give him judgment on the demurrer, and his costs, which might exceed the defendant's costs of the cause; but that they could not give that judgment without giving a complete judgment on every part of the record; and the result therefore was that the plaintiff must have that judgment, and the defendant the general judgment.

The rule, therefore, laid down by the Court in *Gildart v. Gladstone*, 12 East, 668, was not re-established by the decision in *Gregory v. The Duke of Brunswick*, though it was by no means questioned; and it remains therefore to consider whether it was right. We think *it [*970 was right. The former cases adverted to in the argument in this case(b) were chiefly reversals of judgments on demurrer prior to stat. 8 & 9 W. 3, c. 11, s. 2, which gave the defendant his costs on demurrer; and therefore the simple reversal gave all the relief to which the defendant, the plaintiff in error, was entitled. The same reason applied to reversals of judgments for the plaintiff for defective declaration, after judgment by default or verdict against the defendant; and, though the same position is laid down in general terms in some cases since stat. 8 & 9 W. 3, c. 11, it may be attributed to inadvertence in not sufficiently considering the reason of the rule. It seems just and reasonable that, whether the plaintiff or defendant brings a writ of error, each should have all the justice done him by the Court of Error which the nature of the case admits, and that he should not only have a judgment of reversal, but such a judgment as the plaintiff in error ought to have had in the Court below. This is the principle of the decision in the case of *Gildart v. Gladstone*, 12 East, 668: and we are of opinion that it was right and is good law.

But the question in this case is different: it is not whether the plaintiff in error is entitled to have, besides a judgment of reversal, a further

(a) Note to *Jaques v. Cesar*.

(b) See the argument and notes, *Gildart v. Gladstone*, 12 East, 669, 670.

judgment for his damages and costs; for he is clearly not entitled to more than the former: but whether *the defendants* on this writ of error brought by the plaintiff are entitled, after the judgment is reversed, to such judgment as the Court below ought to have pronounced in their favour. This is a very different question. Though it is true that, if a *971] party prays judgment and then goes on to ask something which the Court cannot by law give, the Court will nevertheless give the party the proper judgment, as was held in the cases of *Street v. Hopkinson*, Ca. K. B. temp. Hard. 345, and *Le Bret v. Papillon*, 4 East, 502, it does not follow that they can give a judgment, against his prayer, for the opposite party: and we do not find any satisfactory precedents of such a course. In *Rex v. Bourne*, 7 A. & E. 68, 69, which is itself an authority to the contrary, Mr. Justice PATTERSON remarks on the absence of authorities to the effect that the Court could give the proper judgment for one party on a writ of error at the suit of another. In an Anonymous (a) case, which states that "if judgment be below for the plaintiff, and error is brought, and that judgment reversed; yet if the record will warrant it, the Court ought to give a new judgment for the plaintiff," he observes that it does not appear who brought the writ of error; nor does it in the note of the same Anonymous case in 7 Mod., 7 Mod. 2. Both of these are merely loose notes. In *Rolle's Abr.* 774, (b) however, *Slocomb's Case*, Cro. Car. 442, on the prayer of a plaintiff to reverse a judgment for the defendant in an action of slander, which was not maintainable, the declaration being insufficient (it appearing that the terms of the judgment were "ideo concessum est" instead of "consideratum"), the Court did not merely reverse, but gave a judgment *against the plaintiff* quod nil capiat, &c. That, however, is a necessary consequence of the reversal in that case; for the Court could not give judgment for the plaintiff. In *Rees v. Morgan*, 8 T. R. 350, on a writ of error by the *972] plaintiff in a replevin on an erroneous judgment on stat. 17 C. 2, c. 7, s. 8, BULLER, J., says: "suppose this judgment were reversed on a writ of error, we should award a judgment pro retorno habendo:" and therefore adjudicates in favour of an application by the defendant in error to amend the record by inserting such a judgment. Also, in answer to a question put by the House of Lords, 4th May, 1793, to the Judges, in *Rex v. Amery*, 1 Anst. 178, whether, if on a writ of error the judgment of the Court below be reversed, the Court of Error must give the same judgment that the Court below ought to have given, the Judges answered in the affirmative. This, however, was a case in which the relator, the plaintiff below, brought a writ of error; and the Judges may have answered with a view to the particular case. On the other hand, there are many precedents of reversals of judgments, as is observed by the Lord Chief Baron in the case of *Gregory v. Duke of*

(a) 1 Salk. 401.

(b) 1 Roll. Ab. 774, tit. *Error* (D), pl. 1.

Brunswick, 8 Com. B. 495, where a misericordia is entered instead of a *capiatur pro fine*, and vice versa, which cannot be reconciled with the supposition that the Court might on a writ of error by the defendant have given against the defendant the proper judgment. These defects are cured by the statute 16 & 17 C. 2, c. 8: and it is not to be supposed that they were curable without the aid of the statute by merely entering the proper judgment. And, besides, the consequence of such a course would be that a plaintiff in error, who had a perfect right to sue out his writ of error, would pay the costs of it, and yet be defeated in his object. In effect, he would cause an amendment in the judgment at his own expense instead of that of the opposite party.

*We think that a Court of Error cannot give a judgment *against* [*973 the party suing out a writ of error, after reversing an erroneous judgment against him, though they may give one in his favour, whether he be plaintiff or defendant in the Court below, on his prayer for judgment, to the full extent to which he would have been entitled to it in the Court below.

For these reasons, the judgment of the Court of Queen's Bench must be reversed. Judgment reversed.(a)

(a) See, on the last point, *Campbell v. The Queen*, ant², pp. 799, 814, 821. Also *Scott v. Wedlake*, 7 Q. B. 766.

CUTLER v. BOWER. May 9.

In an action of covenant, the deed was set forth on oyer, reciting a former deed between plaintiff and defendant, whereby plaintiff licensed defendant to use a patent, of which plaintiff appeared by the deed, as recited, to have obtained a regular grant. *Quære*, whether defendant was estopped by the latter deed from denying that the patent was valid, as recited in the earlier deed, or only from denying that a deed alleging that fact was executed.

By the earlier deed, plaintiff licensed defendant to use his patent during a term, paying a stated royalty. By the deed declared upon, reciting the earlier deed and a subsequent contract of defendant with plaintiff for purchase of half the patent, subject to the former deed but with benefit to defendant of half the royalty, plaintiff, in pursuance of the contract, and in consideration of 2200*l.* to be paid to him by defendant, assigned the patent to a trustee, subject to the previous indenture, and in trust to apply the sums accruing from licenses to use the patent, and likewise to apply the royalties, for or under the direction of plaintiff and defendant respectively, in specified proportions, and to stand possessed, as to one moiety of the letters patent, for plaintiff, as to the other, for defendant. Plaintiff covenanted that, for and notwithstanding anything done, &c., by him, the patent was valid, and should be held and enforced, by the trustee without lawful let, &c., by plaintiff, or any claiming under him, or by his act or default. And defendant covenanted with plaintiff to pay him the 2200*l.* by instalments. To a declaration in covenant for non-payment of such instalments defendant pleaded, after oyer of the deed declared upon, that plaintiff was not the first inventor; by reason whereof the patent, before the supposed breach of covenant, was void. Replication, estoppel.

Held, on general demurrer, that the plea was bad. For,

1. No eviction was stated: and, in fact, the matter pleaded did not go to the whole consideration; since, even if the patent was void, the first executed deed would have bound the defendant, by estoppel, to payment of the royalty; and, by the latter deed, he became entitled to half the royalty.
2. That the covenant to pay the 2200*l.* was an independent covenant, and capable of being enforced whether the plaintiff's covenants were performed or not.

COVENANT on an indenture of 11th October, 1842, between Job Cutler, the plaintiff, of the first part, Edward Bower, the defendant, of the *974] second part, and *Thomas Slaney of the third part (profert), by which defendant covenanted to pay plaintiff 2200*l.* by instalments. General averment of performance on plaintiff's part. Breach, non-payment.

Plea 1 set out the indenture on oyer, reciting as follows. "Whereas, by letters patent," &c., "bearing date," &c. (November 6th, 1841), "Her present Majesty Queen Victoria did give and grant," &c., "unto the said Job Cutler, his executors, administrators, and assigns, and his and their deputy or deputies, servants, or agents, her special license," &c., "to make, use, exercise, and vend an invention entitled 'Improvements in the construction of the tubular flues of steam boilers' within," &c. (England, Wales, and Berwick upon Tweed) "during the term of fourteen years from the date of the said letters patent, and subject to certain conditions and provisoes in the same letters patent expressed: And whereas the said J. C., in pursuance of a proviso in the said letters patent contained, did, as he doth hereby allege, particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled, on," &c., "in her Majesty's High Court of Chancery: And whereas, by an indenture bearing date on or about the 23d day of July last past, and expressed to be made between the said J. Cutler of the one part and the said Edward Bower of the other part, he the said J. C. did grant unto the said E. B., his executors," &c., "the sole and exclusive liberty, license, and authority to make, use," &c., "the said patent invention of Improvements," &c., "according to the specification to the said patent, and all the other patent rights (if any) of him the said J. C. under his said patent and the specification thereto, *975] *during the then residue of the said term for which the said letters patent had been granted as aforesaid, for his and their own use and benefit, subject to the payment unto the said J. C., his executors," &c., "of a royalty or sum of 2*l.* 6*s.* 8*d.* for every ton (and so in proportion for any quantity less than a ton) of the said Improved tubular flues, which he the said E. B., his executors," &c., "should make and sell in pursuance of the said license; such royalty to be paid on or before," &c. (quarterly payments): And in the said recited indenture were contained several covenants, provisoes, and stipulations, &c., including, &c.: the recital then stated a covenant in the deed of 23d July, 1842, by Cutler to Bower, to take proceedings at law or in equity in case of any infringement, or notice thereof from Bower; covenant by Bower to bear part of the costs; covenants by Bower to deliver accounts, &c.; proviso for making up to Cutler deficiencies in the royalty, so that it should not fall below an average of 16*l.* 13*s.* 4*d.* per month, &c.: (other stipulations were here recited, which it is unneces-

sary to mention further.) The recital went on to state that Bower had contracted with Cutler for the purchase of one equal half part of his letters patent, subject to the indenture of July 23d, but with benefit of half the royalty, &c., to Bower; and, for the purpose of carrying the contract into effect, it had been agreed that the letters patent, &c., subject to the recited license, but with benefit of the royalty and of Bower's covenants, should be assigned to Slaney upon the trusts and in manner after expressed: And it was then, by the indenture of 11th October, witnessed that, in pursuance of the recited agreement, and in consideration of 2200*l.* to be paid by Bower to Cutler by instalments as after *mentioned (which sum was in full for the purchase by Bower of [*976 half the patent and half the royalty, &c.), and of 5*s.*, &c., Cutler, at the request of Bower, testified by his executing that indenture, did by that indenture assign, transfer, and set over to Slaney, his executors, &c., all those the said recited letters patent, &c., and the powers, &c., thereby granted, and the full benefit and advantage thereof or to be derived therefrom, and the right of enforcing the same, and all the right, &c., of Cutler therein, habendum to Slaney, his executors, &c. (with power of attorney to use Cutler's name), subject to the recited indenture, and upon the trusts, &c. The trusts were to grant licenses, under Bower's direction, for using the patent; to enforce, at his request, the payments, &c., contracted for in respect of such licenses, and to be possessed of and apply the sums paid, and the royalties, partly in trust for or by the direction of Bower and partly in trust for or under the direction of Cutler, in specified proportions: and, subject to the trusts, to stand possessed of the letters patent, &c., in trust, as to one half part, for Cutler, and as to the other half for Bower. Proviso against use of the patent by Cutler without Bower's consent: further proviso enabling Slaney to assign the patent to Bower, at his request, on the trusts of this deed: further proviso that nothing herein contained shall affect or prejudice the rights, &c., of Bower under the recited indenture of July 23d, but that the same may be exercised or enforced by him as if these presents had not been executed. Proviso, and covenants by Bower to Cutler, for keeping, and rendering to Cutler, in addition to performance of covenants to Slaney under the recited indenture, a quarterly account of articles sold by Bower under the recited license of July 23d. Proviso as to the place *or places in which Bower should manufacture under the license; [*977 and power for Cutler to enter and inspect. Covenant by Cutler to Bower that, for and notwithstanding anything done or suffered by Cutler, the letters patent, &c., are in all respects good, valid, and subsisting in the law, and not forfeited or become void or voidable; and that, notwithstanding as aforesaid, the patent shall, during the residue of the term, be held and enforced by Slaney upon the trusts, &c., without lawful let, &c., by Cutler or any person claiming or to claim under him, or by his act or default: also for further assurance to Slaney, at

Bower's request. Mutual covenants by Cutler and Bower against causing the share or interest of either to become vested in or in trust for more than six persons at one time; and not to do or wilfully permit any act or default whereby the patent, &c. "shall or may cease or determine, or become voidable or liable to be impeached. And the said Edward Bower doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Job Cutler, his executors, administrators, and assigns, in manner following, viz.: That he the said Edward Bower, his executors or administrators, shall and will well and truly pay or cause to be paid unto the said Job Cutler, his executors, administrators, or assigns, the full sum of 2200*l.* of lawful money current in Great Britain, by or in the several instalments or proportions, at the respective times, and otherwise in the manner, hereinafter expressed; that is to say:" specifying dates and amounts: "And moreover that he, the said Edward Bower, his executors," &c., "shall and will in like manner pay" to Job Cutler, his executors, &c., interest at 5 per cent., &c. "Provided," &c.: proviso *978] and declarations for the *security of the trustee. "In witness," &c. The residue of the first plea was not set out on the paper-books.

Plea 2 set forth the letters patent, which recited, in the usual form, a representation by Cutler that he had invented "Improvements," &c., and was the first inventor thereof, and that the same had never been practised or used by any other person or persons whomsoever to his knowledge or belief: the usual proviso was added for determination of the patent, if it should appear that the invention was not new, &c. And the plea concluded by averring: "That the plaintiff was not the true and first inventor of the said supposed invention in the said indenture and letters patent mentioned; whereby, and by reason and means whereof, the said letters patent and the said licenses, powers," &c., "supposed to have been thereby given and granted as in the said indenture and letters patent mentioned, were, at the time of the making of the said letters patent, and before the making of the said indenture, and before the committing of any of the said supposed breaches of covenant," &c., "to wit, on the 6th day of November, A. D. 1841, and from thence hitherto have continued to be, and still are, null, void, and of none effect:" of all which, &c.; notice to plaintiff before making the indenture. Verification.

Replication to plea 2. That defendant ought not to be admitted or received to plead that plea, as to so much thereof wherein he alleges that plaintiff was not the true and first inventor of the said supposed invention, because he says: That, after the granting of the letters patent in that plea mentioned, to wit, on July 23d, 1842, by a certain indenture then made *979] between plaintiff of the one part, and defendant of the other (profert), the date whereof is the day and year last aforesaid, in and by which said indenture it was and is averred that,

&c. (the replication then stated in substance the recitals of that deed, which expressed that plaintiff had invented certain improvements, &c.; as above stated; that letters patent had been granted to him, his executors, &c., and assigns, to make, use, &c., his said new invention, entitled, &c., within England, Wales, &c., for fourteen years; that plaintiff had duly enrolled the specification to his said patent, pursuant to the condition therein contained; that plaintiff had, for valuable considerations, agreed with defendant to grant to him, his executors, &c., exclusive license to make, use, &c., the said invention during the term of the said patent, upon the terms and conditions after mentioned), he the said plaintiff, in pursuance of the said agreement, and in consideration of 200*l.*, &c., and of the reservations and covenants on defendant's part to be observed and performed, did give and grant to defendant, his executors, &c., exclusive license, &c., to make, use, &c., the said invention, &c., during the residue of the term, yielding and paying, &c.; (royalty of 2*l.* 6*s.* 8*d.* per ton, &c.) Averments identifying the indenture here pleaded with that of July 23*d.*, referred to in the indenture of October 11*th*, 1842, declared upon by the plaintiff; identifying also the letters patent mentioned in the indenture of July with those mentioned in the indenture of October, the Improvements referred to in one indenture with those spoken of in the other; and the grant stated in the former indenture with the grant recited in the indenture declared upon. Verification. Wherefore the *plaintiff prayed judgment if defendant [980 ought to be admitted or received, against his own acknowledgment by his deed aforesaid, to plead the 2*d* plea, as to so much thereof wherein he alleges that the plaintiff is not the true and first inventor, &c.

There were four other pleas alleging invalidity of the patent; (a) the 7*th* plea setting out the specification, and alleging that the plaintiff did not thereby or otherwise describe the nature of his invention. To these, respectively, the plaintiff replied estoppel by the indenture of July 23*d.*, 1842.

The defendant set out this last-mentioned indenture on oyer, and demurred generally to the replication to each plea. Joinder in demurrer.

The demurrer was argued this term. (b)

Hill, for the defendant, argued the point of estoppel, and cited *Carpenter v. Butler*, 8 M. & W. 209, *Bowman v. Taylor*, 2 A. & E. 278, *Hayne v. Maltby*, 3 T. R. 488. (On this part of the argument the Court gave no decision.)

Peacock, contra, cited, on the subject of estoppel, the same cases, *Oldham v. Langmead*, (c) and *Doe dem. Johnson v. Baytop*, 3 A. & E. 188. But, further, if it could be assumed that the patent was void,

(a) On the grounds (plea 3) that the supposed invention was not an invention of improvements &c., in manner, &c.: (5) that it was not new: (7) that plaintiff did not, by his specification, particularly describe, &c.: and (8) that no specification was enrolled in due time.

(b) May 24 and 5*th*. Before Lord DENHAM, C. J., PATTERSON, WIGHTMAN, and BAILEY, J.

(c) Cited in *Hayne v. Maltby*, 3 T. R. 489, 441.

*981] and the plaintiff's *covenant in that respect broken, still the covenant to pay 2200*l.* is independent, and may be enforced, according to the law laid down in note (4) to *Pordage v. Cole*, 1 Wms. Saund. 320 a, 320 c, 6th ed., even though it should appear that the defendant gained no benefit under the plaintiff's covenant. But that is not so here. The failure on the plaintiff's part, if there be one, does not affect the whole consideration for the defendant's covenant. He has some benefit from the grant. At least he gains half the royalty, which he was before bound to pay. The plaintiff does not profess to warrant absolutely, but he gives a limited covenant for title and for undisturbed user. [Lord DENMAN, C. J. Such as it may be worth while for the grantee to take his chance upon.] There might be a defect which no one but the defendant might ever have discovered. He is not to pick it out as a defence of his own breach of covenants. He might perhaps enjoy the patent to the end of the term: if he was disturbed before that time, he might sue the grantor for damages; but the disturbance could be no answer to an action on the undertaking to pay. On this point a proper test would be whether, on showing the patent to be void, the grantee could recover back the instalments already paid; and *Taylor v. Hare*, 1 New. Rep. 260, shows that he could not. It is sufficient, however, that the defendant has engaged himself to this payment by an independent covenant. *May v. Trye*, Freem. K. B. & C. P. 447, S. C. 3 Keb. 764, 780, closely resembles the present case. There a deed recited that, whereas plaintiff had assigned over a patent to defendant "(which patent in law did *982] appear to be void)," defendant covenanted to pay 470*l.* per *annum for seven years. Defendant's counsel argued, "it appearing that the patent was void, that the covenants should be void too: but the Court denied it, though they admitted the case of a covenant to pay rent; if the lease be void, the covenant is void too. But they said here the recital of the patent is only the consideration; and if there be no consideration, yet the covenant is good." In *Hayne v. Maltby*, 3 T. R. 438, the plaintiffs had granted to the defendant the use of a patent engine, and covenanted that he should freely employ it for a term; defendant covenanted that he would not, during the term, use any other patent engine than that allowed by plaintiffs: and it was held that, in an action for using such other engine, the defendant might allege that the invention was not new. But that was not the case of a covenant simply to pay money; and *May v. Trye* was not referred to. No fraud is charged in the present case: the mention of notice to the plaintiff does not involve such an allegation.

Hill, in reply. The want of title goes to the whole consideration. If the patent is bad, the defendant has not gained any benefit under the indenture declared upon, which confers no advantage beyond those previously granted. [ERLE, J. There is the exemption from payment of half the royalty.] That can result only from the general operation of the deed: there is no release of it in terms. The report in *Freeman* of

May v. Trye is very short; and the proposition, as laid down, that, if there was no consideration, yet the covenant was good, does not seem well considered. The *case, in Keble, (a) ends with an adjournment. The Court, there, seems to have thought that, the patent [*988 itself being void, all interests depending upon it were null likewise. At all events, the case, as reported, can have little weight. The pleadings here, on the plaintiff's part, do not allege any enjoyment: and the pleas show that which is tantamount to an eviction, according to the doctrines laid down in Siade v. Thompson, 1 Roll. Rep. 198, 199, and Duke of St. Alban's v. Shore, 1 H. Bl. 270. [PATTESON, J. I do not know that invalidity of the patent amounts to an eviction.] The grantee does not obtain that which induced him to purchase the grant. The assignment of a patent is the transfer of a right: if there is no right, nothing is gained. This reasoning does not apply only to conveyances of land, as appears from the judgment of Lord LOUGHBOROUGH in Duke of St. Alban's v. Shore. Even if there could be an estoppel in this case, the 7th plea sets forth the specification; and, if the Court see that it is defective, they will give judgment accordingly. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (May 9th), delivered the judgment of the Court.

This was an action upon a covenant to pay a sum of 2200*l.* by instalments, contained in an indenture dated the 11th of October, 1842.

The declaration merely stated the covenant to pay the money at specified periods, and assigned a breach by non-payment of two of the instalments. The defendant cravedoyer of the deed, which recited the *grant of letters patent to the plaintiff in 1841, for an invention, [*984 entitled "Improvements in the construction of the tubular flues of steam boilers;" and also recited a deed dated the 23d July, 1842, by which the plaintiff granted to the defendant the sole and exclusive liberty and license to make and vend the patent invention, subject to the payment to the plaintiff of a royalty of 2*l.* 6*s.* 8*d.* for every ton of the tubular flues made under that license, with a proviso for keeping the royalty at an average of 16*l.* 18*s.* 4*d.* per month. The deed of 11th October then went on to recite that the defendant had agreed with the plaintiff for the absolute purchase from him of one half part of the letters patent, subject to the indenture of the 23d July, but with the benefit to the defendant of one half of the royalty thereby reserved; and then stated that, in consideration of 2200*l.* for the purchase of half the patent and half the royalty, the plaintiff did by that indenture of 11th of October assign and transfer to a trustee for the defendant the letters patent and the matters intended and agreed to be assigned as mentioned in the deed: and then followed (after certain other provisions) the covenant declared upon, for payment of the 2200*l.* by instalments. The

(a) 3 Keb. 780.

letters patent, which were in the usual form, were also set out in the pleas after the deed declared upon.

The defendant pleaded, in several pleas, that the plaintiff was not the first inventor of the improvements: that the supposed invention was not an invention of improvements as represented by the plaintiff; that the supposed invention was not new; and that the invention was not properly specified, and the patent void.

*985] *To these pleas the plaintiff replied estoppels by the recitals in the indenture of the 28d of July, 1842, which are set out in the replications; to which the defendant has demurred generally.

Upon the argument it was contended, on the part of the defendant, that, though since the case of *Bowman v. Taylor*, 2 A. & E. 278, he might be considered estopped by recitals of specific facts in the deed declared upon, he was not, in *this action*, estopped by recitals in the deed of the 28d of July; and that the only effect of reciting that deed in the indenture declared upon was, that he was estopped from denying that such an indenture was made; and that he was at liberty to dispute any specific fact stated in that deed only and not in the indenture declared upon. It was also contended that, even if estopped from denying that there was *any* specification, he was not estopped from showing that the specification did not support the patent. Many cases were cited upon the question of the estoppel; and much learning and ingenuity were displayed on both sides: but we think it unnecessary to give any opinion upon that question, as an objection was taken to the pleas of the defendant, which we think must prevail; and which consequently renders any question as to the validity of the replications immaterial.

The defence proposed to be set up by the pleas is failure of consideration: that the patent is invalid, and that he is not bound by his covenant to pay the money, which appears by the deed to be the purchase-money for a patent which it is said turns out to be worthless. But it appears to *986] us that there are two decisive *objections to this defence. The first is, that, there not having been any eviction, the consideration does not wholly fail; for the defendant was at all events bound by the indenture of the 28d of July to pay 1*l.* 1*s.* 4*d.* a month for royalty to the plaintiff, whether the patent were valid or not, as he would be estopped in an action upon that deed from denying the validity of the patent; and by the deed upon which the action is brought he becomes entitled to half that royalty. And, in the next place, the proposed defence could only be available in case the covenant upon which the action is brought was a dependent covenant, to be performed only if some condition is observed by the other party: but in this case the covenants of the plaintiff relating to the patent, and that of the defendant for payment of the purchase-money, are wholly independent of each other; and each party may recover against the other for a breach of their respective covenants. There is no plea of fraud or eviction: and it appears to us that, upon this deed

and these pleadings, the invalidity of the patent, as stated in the pleas, affords no ground of defence at law to an action upon the covenant in question, which may be considered in effect as a mere covenant in gross for the payment of money.

Our judgment therefore is for the plaintiff.

Judgment for plaintiff.

*WILLDING v. TEMPERLEY. May 12. [*987

In an affidavit filed by a creditor, under stat. 5 & 6 Vict. c. 122, s. 11, to bring a debtor before the Court of Bankruptcy, *Quære*, whether it be sufficient, in every case, to state the items of demand on the creditor's side, or whether, if there be cross claims, he is bound to state also the amount for which he gives credit. *Semble*, per Lord DENMAN, C. J., and PATTERSON, J., that he is. *Semble*, per BULL, J., contra.

But, if the creditor, in his affidavit, and in an account referred to by such affidavit and annexed to it, and served upon the debtor, states the total of his claim as 100*l.*, and the account specifies all the items of charge, which are summed up, and amount to 100*l.*, and credit is then given for a gross sum of 11*l.*, which, at the foot of the account is subtracted from the 100*l.*, and the balance, by mistake, set down at 99*l.*: Held that, if the creditor afterwards brings an action and recovers less than 99*l.*, the debtor is not therefore entitled to his costs under stat. 5 & 6 Vict. c. 122, s. 19: For the affidavit must be taken as, substantially, alleging a claim of 89*l.* only.

BUTT, in this term, obtained a rule to show cause why the above-named defendant should not be allowed his costs of suit, to be taxed, &c., and why the plaintiff should not pay or allow such costs to the defendant, pursuant to stat. 5 & 6 Vict. c. 122:(a) *and why plaintiff should not be restrained from taking out execution for the amount [*988

(a) "An act for the amendment of the law of Bankruptcy." Sect. 11 enacts: "That if any creditor of any trader, within the meaning of this or any other statute relating to bankrupts now or hereafter to be in force, shall file an affidavit in the Court authorized as hereinafter provided to act in the prosecution of suits in Bankruptcy in the district" "in which such debtor shall reside, or in the Court of bankruptcy if such debtor shall not reside in any such district, in the form specified in schedule hereunto annexed (A. No. 1), of the truth of his debt, and of the debts, as he verily believes, being such trader as aforesaid, and of the delivery to such trader, personally, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof," the Court may summon such trader to appear before it: By sect. 12 the Court, on appearance, may require such trader to state whether or not he admits the demand, or any and what part, and may allow him to make a deposition on oath that he believes he has a good defence. And, by section 13, if the trader does not appear (having no lawful impediment, &c.), or, appearing, refuses to admit the demand, and does not make a deposition as above, he shall be deemed to have committed an act of bankruptcy unless, within fourteen days after personal service of summons, &c., he shall pay, secure, or compound for the demand, or give security to pay such sum as shall be recovered in any action brought or to be brought for recovering the same.

Sect. 19 enacts: "That in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the amount of the sum for which he shall have filed an affidavit of debt under the provisions of this act, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such Court shall thereupon, by a rule or order of the same Court, direct

recovered in this action, unless the same should exceed, and then only for the excess beyond, the costs taxed for defendant; and why plaintiff should not be restrained from taking his execution for costs; and why a suggestion should not be entered on the record under sect. 19 of the act; and why plaintiff should not pay the costs of this application.

It appeared by the affidavit on which the rule was granted that the defendant, being a trader, was served with a summons from the Court of Bankruptcy under stat. 5 & 6 Vict. c. 122, s. 11, grounded on an affidavit of the plaintiff, a copy of which (and of the account and notice therein mentioned) was annexed to the present affidavit, and which stated as follows. "That George Carr Temperley, of," &c., "coal merchant, is
*989] justly and truly indebted unto this deponent in the sum *of 99*l*. 19*s*. 7*d*., for goods sold and delivered, and for money lent, to the said G. C. T., and at his request: and" "that the said G. C. T., as this deponent verily believes, is a trader," &c., "and resides," &c.; "and that an account in writing of the particulars of the demand of the said John Willding, amounting to the said sum of 99*l*. 19*s*. 7*d*., with a notice thereunder written, in the form prescribed by the statute," &c., "purporting to require immediate payment of the said debt, is hereunto annexed:" and that deponent did, on, &c., "personally serve the said G. C. T. with a true copy of the said account and notice." The affidavit in support of the present rule stated that such account and notice were in fact served on the defendant: that Temperley appeared before the Court of Bankruptcy according to the summons, and filed a deposition, alleging that he verily believed he had a good defence to 54*l*. 15*s*. 10*d*., part of the said demand: and that Willding afterwards brought his action, and endorsed the writ as for 100*l*. 14*s*. 7*d*. The pleadings were annexed to the affidavit; declaration in debt for goods sold and delivered, and on an account stated; particulars of demand, 100*l*. 14*s*. 7*d*., as by account before delivered, exceeding the compass of three folios: pleas, Never indebted; and a set-off, which was denied by the replication. The affidavit went on to state that the cause was tried, and a verdict given for the plaintiff for 86*l*. only: that, as the defendant verily believed, Willding had no reasonable or probable cause for making affidavit of a debt to the amount of 99*l*. 19*s*. 7*d*. And that it was shown on the trial by Willding's own evidence (he having put in the said account and notice as part of such evidence) that defendant had a set-off to the amount of 10*l*. 15*s*.; and, as to the residue *which Willding failed to recover,
*990] he gave no evidence in support of his demand.

The above-mentioned account stated charges for goods supplied by Willding, and gave credit for coals furnished to him. The total amount

that such costs shall be allowed to the defendant;" in which case the plaintiff shall be disabled from taking out execution for the sum recovered unless it exceed, and then so far only as it shall exceed, the defendant's taxed costs; and, if such costs exceed the sum recovered, the defendant may take out execution for the excess.

of claim, and the credit (of which no particulars appeared), were stated as follows.

	£	s.	d.
	100	14	7
Creditor, balance for coals supplied, - - -	10	15	0
	<hr/> £99 19 7 <hr/>		

An affidavit, sworn by Willding and the clerk to his attorney in opposition to the rule, stated that Temperley, being indebted to Willding, had advertised his furniture and effects for sale; and Willding, and other creditors of Temperley, apprehended that he would not apply the proceeds in payment of his debts. That Willding thereupon consulted his attorney, who advised him to proceed under stat. 5 & 6 Vict. c. 122. That Willding, at the desire of his attorney's clerk, furnished him with the particulars of his demand (comprising about ninety items) and of the set-off which he proposed to allow. That the clerk, on subtracting the amount of set-off, erroneously made the balance, as Willding afterwards discovered, 99*l.* 19*s.* 7*d.* instead of 89*l.* 19*s.* 7*d.* Both deponents stated that the inaccuracy was purely accidental and unintentional, and the effect of haste, the clerk, as he deposed, being informed that Temperley was on the point of leaving his residence. The affidavit then stated that, on the hearing in the Court of Bankruptcy, the error was pointed out by counsel for Temperley, and was explained; but the Commissioner discharged the summons with costs, on *Temperley's affidavit that he believed he had a good defence as to 54*l.* [*991 15*s.* 10*d.* That Willding thereupon considered that all proceedings on the summons were determined, and that he might take steps for recovery of his demand, irrespective of and unconnected with the proceedings in bankruptcy; and he accordingly commenced his action, in which Temperley delivered particulars of set-off amounting to 16*l.* 10*s.* 1½*d.* That a verdict was found for 86*l.* debt, and 1*s.* damages; the difference of 13*l.* 19*s.* 7*d.* between the sum recovered, and the sum claimed in the Court of Bankruptcy, being composed of the 10*l.* demanded by mistake, 1*l.* for cash (which the plaintiff had in fact lent the defendant, but was unable to give evidence of the loan), and other trifling items which the plaintiff failed to prove at the trial. Willding further stated that, at the time of making and filing his affidavit of debt, he believed the 10*l.* 15*s.* to have been correctly deducted; that he had always before and since intended to give credit for it; that he, at the said time and ever since, believed the whole of the goods included in the particular of demand to have been supplied and not paid for; and that he did not make the affidavit of debt to the amount therein stated for the purpose of harassing the defendant or swelling the amount of his own demand in

order to bring it within the statute,(a) or put the defendant to unnecessary expense or inconvenience.

Shee, Serjt., now showed cause. It was a question in *Smith v. Temperley*, 16 M. & W. 273, but was not decided, whether an affidavit of debt to a certain amount was made without reasonable or probable cause *992] according to stat. 5 & 6 Vict. c. 122, s. 19, when the plaintiff swore to the whole amount of his own demand, not giving credit for sums due from himself to the defendant. [PATERSON, J. A defendant is indebted to a plaintiff in so much, though there may be a cross demand. You could not assign perjury on such an affidavit. But the question under this statute may be different.] The plaintiff here intended to give credit for the cross demand. (He then referred to the affidavits as to mistake.) [WIGHTMAN, J. Under stat. 43 G. 3, c. 46, s. 3, it was not necessary to show a malicious intention; *Donlan v. Brett*, 10 B. & C. 117.] TINDAL, C. J., appears to have thought otherwise in *Sherwood v. Tayler*, 6 Bing. 280,(b) where he said: "It has been contended, that if, under all the circumstances of the case, it was unreasonable in the plaintiff to arrest the defendant, the latter is entitled to his costs; but the construction which has been put on the statute is, that the defendant is only entitled to them if the plaintiff holds him to bail for a sum materially larger than that which is found to be due; and the labouring oar is thrown on the defendant to show that so much was not due. The object of the statute was to save the defendant the expense and inconvenience of an action for a malicious arrest, and the proof offered on applications such as the present, must go to the same extent as the proof in such an action." In the present case there could be no improper motive: a demand of 50*l.* would have been sufficient to bring the defendant within the statute. [WIGHTMAN, J. In *Erie v. Wynne*, 1 Cro. & M. 532, S. C. 3 Tyr. 586,(c) BAYLEY, B., said: *993] "The doctrine, that it is necessary, in support of the motion" (for costs under stat. 43 G. 3, c. 46, s. 3), "to make out malice, has been overruled over and over again. We now decide upon the words of the act of parliament, and consider whether there be 'reasonable or probable cause.'"] Stat. 5 & 6 Vict. c. 122, makes it discretionary in the Court to grant costs or not: for sect. 19 entitles the defendant to the relief there mentioned, provided it shall appear that the plaintiff had not reasonable or probable cause for making an affidavit of debt in the amount sworn to, "and provided such Court shall thereupon, by a rule or order," "direct" such costs to be allowed. Nothing beyond mistake is alleged here; nor has any one been misled.

Butt and *Maynard*, contrâ. Stat. 5 & 6 Vict. c. 122, s. 19, is a re-enactment, for the present purpose, of stat. 43 G. 3, c. 46, s. 3, under

(a) By sect. 9, the debt of a single petitioning creditor must be 50*l.*

(b) See *Nicholas v. Hayter*, 2 A. & E. 248, 254.

(c) Where the Court is said to have cited *Donlan v. Brett*, 10 B. & C. 117, as overruling the doctrine in question.

which want of probable cause was deemed sufficient: and that want, here, is admitted. In *Smith v. Temperley*, 16 M. & W. 278, the point now under consideration was treated as doubtful, but the learned Judges appear to have thought that stat. 5 & 6 Vict. c. 122, might not apply because a plaintiff may bring an action for his whole demand without noticing a set-off. That, however, as appears by the judgment of this Court in *Dromfield v. Archer*, 5 B. & Ald. 513, would have been no answer to an application under stat. 43 G. 3, c. 46, s. 8; nor is it so here. A decision on either statute must turn upon the precise rule which the legislature has laid down: that was expressly held, as to stat. 43 G. 3, c. 46, in *Erle v. Wynne*; and *the same doctrine, as to that statute, results [994] from *Bates v. Pilling*, 2 Cro. & M. 374, S. C. 4 Tyr. 231. (a) [ERLE, J. The affidavit with a view to bankruptcy is only a summons to the debtor to come in.] The amount sworn to fixes the amount of security to be given for paying what may be recovered in an action. [ERLE, J. That is, if the summoned party does not answer the affidavit. Suppose the creditor said merely, the trader owes me 100*l.*, and I owe him 10*l.*, and did not subtract the one sum from the other; would there be any objection? The act requires an account to be delivered to the debtor; he may admit or deny as much as he thinks proper. PATTESON, J. There might, under the older act, have been reasonable cause for swearing to a certain amount of debt, though not cause to arrest for that.] The statements here show that there was no cause for making the affidavit. A party may, if he thinks proper, bring an action for the whole of his demand, without any reference to a cross demand; but then he must not make affidavit in that form under stat. 5 & 6 Vict. c. 122. [ERLE, J. The affidavit under sect. 11 is independent of any action; it belongs to a different channel of proceedings.] It may be in this case that the account delivered under the act discloses the truth, and shows that there has been a mistake. But that only proves absence of malice. (b) There could not be reasonable or probable cause for swearing to a debt of 99*l.* 19*s.* 7*d.*

Lord DENMAN, C. J. I should wish to place these applications on an intelligible principle: and we should, *I think, do so by deciding [995] that a party acting on the 11th section of this statute is bound to make affidavit of the amount of debt that remains after giving credit for what is due from himself. Here the plaintiff has in effect done so. He states by his affidavit in the Court of bankruptcy how his demand is made up, and refers to his account annexed, where he claims 100*l.* 14*s.* 7*d.*, and gives credit for 10*l.* 15*s.* That leaves, not 99*l.* 19*s.* 7*d.* as stated, but 89*l.* 19*s.* 7*d.* But, taking the statements together, it was clear that this was the sum actually claimed.

(a) See *James v. Askew*, 8 A. & E. 351.

(b) As to this distinction, *Mitchell v. Jenkins*, 5 B. & Ad. 386 (judgment of Lord DENMAN), was here referred to.

PATTESON, J. I should be sorry to lay down that a party might make an affidavit of this kind without allowing for a set-off: but it is unnecessary to decide anything on this point. Here we must take the affidavit with the particulars annexed. The affidavit refers to the account. It is true that, by the figures there, 99*l.* 19*s.* 7*d.* appears to be claimed; but the account shows a demand of 100*l.* 14*s.* 7*d.*, from which 10*l.* 15*s.* is deducted. There is a mistake; but no one can be deceived by it. In substance, 89*l.* 19*s.* 7*d.* is stated as the amount of claim.

WIGHTMAN, J. We need not decide whether an affidavit of this kind must allow credit for cross demands. Here the plaintiff has, substantially, done so, in the account annexed to the affidavit and referred to by it. If the statements there are taken together, it is clear that the demand is of 100*l.* 14*s.* 7*d.*, minus 10*l.* 15*s.* for which credit is given. The defendant, therefore, is not entitled to costs.

*996] *ERLE, J. If perjury were assigned on the statement in this affidavit as to the total sum due, the plaintiff would clearly be acquitted, because the affidavit refers to an account "hereunto annexed," which account shows that the sum claimed is the balance after deducting 10*l.* 15*s.* from 100*l.* 14*s.* 7*d.*, and, consequently, that the plaintiff never really stated 99*l.* 19*s.* 7*d.* to be due. That is enough to dispose of the present rule. But I think it advisable to say that there is a great difference between an affidavit to hold to bail, and an affidavit to bring in the debtor before the Court in bankruptcy. The latter affidavit is not, per se, a foundation for any proceeding, but has only the effect of requiring the party to come before the Bankruptcy Court and answer as the statute points out. I think that the party making affidavit may state his own side of the account; I do not know that he is bound to allow a set-off. I think it highly adable that he should say there is a set-off; but I doubt whether it is necessary that he should make an absolute allowance to any particular amount. Rule discharged.

*997] *GREVILLE v. STULTZ and Others. [Dec. 3, 1847.]

(In Error.)

Where a commission issues, under stat. 1 W. 4, c. 22, s. 4, for the examination of witnesses abroad, the place of examination must be specified in the rule or order authorising the commission, or in some subsequent rule or order.

And examinations taken under such commission are inadmissible in evidence, if the order be produced, omitting to specify place, though the commission itself, under the seal of the Court, contain all necessary particulars.

ERROR coram nobis, to reverse judgment of outlawry against the plaintiff in error. The error assigned was, that the plaintiff, at the time of the awarding and issuing the writ of *exigi facias* upon which the said

judgment of outlawry was pronounced, and from thence continually afterwards, until the time of pronouncing the said judgment, was in parts beyond the seas, to wit, at Enghien, in the department of Seine et Oise, in the kingdom of France. Verification, and prayer of judgment and reversal.

Plea. That plaintiff was not in parts beyond seas, modo et formâ. Conclusion to the country. Issue thereon.

On the trial, before PATTESON, J., at the Middlesex sittings in Michaelmas term, 1846, the plaintiff in error relied upon depositions taken in France under a commission, and tendered in evidence the commission, and the order directing the same to issue. The order was made by POLLOCK, C. B., on 14th August, 1846, and was in the terms following.

“Greville
v.
Stals
and others,
in Error.” } Upon hearing the attorneys or agents on both sides, and on reading the affidavit,” &c., “I do order that a commission do issue herein to examine Adelaide Vandenhende and Celina Hugnegny as witnesses herein on behalf of the plaintiff in error, who now reside at Enghien les Bains, Seine et Oise in the kingdom of France, on interrogatories. That the commission, interrogatories, and depositions, when taken, be returned me at my chambers,” &c.

*A copy of this order was served on the defendants in error on the same day: and on the 19th of August a commission issued, [*998 under the seal of this Court, and addressed to three Commissioners named and described therein.

The commission authorized the Commissioners, or any two of them, to examine the above-named witnesses, upon interrogatories to be exhibited to them by the parties in the cause, and commanded “that on or before the 24th day of October next, at a certain day and place, or certain days and places, to be appointed by you, or any two or more of you, for that purpose, you cause the said witnesses to come before you at Paris, in the kingdom of France, and then and there examine each of them apart upon the said interrogatories, on their respective corporal oath first taken before any two or more of you, according to the form of their several religions; and that you do take such their examinations, and reduce them into writing on paper or parchment in the English language; and, when you shall have so taken them, you are to send the same without delay to the Right Honourable Sir FREDERICK POLLOCK, Knight, Chief Baron of Her Majesty’s Court of Exchequer, at his chambers,” &c., “closed up under your seals or the seals of any two or more of you, distinctly and plainly set, together with the said interrogatories and this writ, to be filed of record in our said Court at Westminster.” Power was given to the Commissioners, &c., “to swear any one or more interpreter or interpreters, upon his or their oath or oaths, solemnly, well and truly to interpret the oath or oaths and interrogatories, which shall be administered and exhibited by either of the said parties to any such wit-

*999] ness or witnesses who do not *understand the English language, out of the English into the language of such witness or witnesses, and also to interpret their respective depositions taken to the said interrogatories out of the language of such witness or witnesses into the English language. And we further command that all and every the clerk or clerks, interpreter or interpreters, translator or translators, employed in taking, interpreting, writing, transcribing, translating, or engrossing the deposition or depositions of witnesses, or in translating the questions to and answers of the said witnesses to be examined by virtue hereof, shall, before he or they be permitted to act as clerk or clerks, interpreter or interpreters, translator or translators, as aforesaid, severally take an oath truly and faithfully, and without partiality to any or either of the parties in the cause, to interpret and translate the several questions and answers, and to take and write down, transcribe and engross, the deposition of all and every witness and witnesses produced before and examined by you the said Commissioners, or any of you, as far forth as he or they are directed and employed by the said Commissioners, or any of them, to take down, write, and engross the said depositions: which oath any two or more of you are hereby empowered to administer," &c. "Witness THOMAS LORD DENMAN," &c.

For the defendant in error, it was objected that the commission and interrogatories could not be read, because the order neither named the Commissioners nor fixed any time or place for executing the commission. The learned Judge thought the objection valid, but allowed the commission and interrogatories to be read. The defendant had not joined in the commission: but a copy of the interrogatories, and notice of the *1000] *executing the commission, and of all subsequent proceedings, had been sent to him.

The return of the Commissioners was then tendered in evidence. The return began as follows. "Depositions of witnesses," &c., "produced, sworn, and examined on," &c., "at," &c., "before," &c.; "we, the acting Commissioners under the said commission, before we acted in or were present at the swearing or examining of any witness, having taken an oath," &c., "and also the interpreter, by us employed to interpret the oaths and interrogatories administered and exhibited to the witnesses who did not understand the English language, out of English into the French language, also to interpret their respective depositions out of the French into the English language, having, before acting in the said commission, been first duly sworn before us well and truly to interpret the oath and oaths and interrogatories which shall be administered and exhibited by either of the said parties to any such witness or witnesses who do not understand the English language, out of the English into the language of such witness or witnesses, and also to interpret their respective depositions taken to the said interrogatories out of the language of such witnesses into the English language; and having done all such other

things as we are directed by the said commission to do before entering upon examination of the two witnesses under the said commission," &c.: then followed the depositions. It did not appear from the return whether or not the witnesses had been examined apart.

The reception of this evidence was objected to, on the ground that it did not appear that the witnesses had been examined apart as required by the *commission; also that the name of the interpreter was not given. The learned Judge received the evidence. Verdict [*1001 for plaintiff.

Barstow, in Michaelmas term, 1846, obtained a rule nisi for a new trial, on the ground that the commission, and the proceedings under it, ought not to have been received in evidence.

Martin and *E. Beavan* now showed cause. The commission has issued in the manner usually adopted when both parties do not join in the commission. It was unnecessary to prove the order at the trial; the commission itself, being under the seal of the Court, raised a presumption that it had issued regularly. To prove a scire facias in pursuance of stat. 7 G. 4, c. 46, s. 13, it would not be necessary in the first place to produce the rule of Court authorizing the writ to issue. In *Steinkeller v. Newton*, 1 Scott, N. B. 148, a commission under an order which neither named commissioners nor time and place of executing the commission was set aside: but there the proceedings under the commission had been taken behind the back of the opposite party; whereas here the defendant has had notice of every proceeding. [COLERIDGE, J. In issuing commissions of this sort, we exercise a statutory power: sect. 4 of stat. 1 W. 4, c. 22, provides that the Court or Judge may "order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the *time, place, and manner of such examination, as well within the jurisdiction of the Court wherein the [*1002 action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."] The section provides nothing as to the naming of the commissioners, in the order; and, as to naming time and place, the matter seems left to the discretion of the Judge; for he is to give "all such directions touching the time, place," &c., "as may appear reasonable and just." In *Clay v. Stephenson*, 3 A. & E. 807, this Court dispensed with the usual requirement that the commissioners should be sworn. The present commission named the Commissioners, and specified time and place; evidence of the order was surplusage. In *Entwistle v. Dent*, (a) tried before POLLOCK, C. B., at the London sittings after Trinity term, 1846, the order under which a commission had issued was called for and

(a) Not reported. *Martin* mentioned the case, stating that he had been counsel in the cause, and had been called upon by *Sir Finlay Kelly* to produce the order.

not produced; and POLLOCK, C. B., held that the commission must be taken to have issued regularly, and that it was unnecessary to produce the order.

Objections are taken to the return also. First, that it does not give the name of the interpreter. [Lord DENMAN, C. J. It does not appear that he was actually called upon to interpret; he may have been sworn and not wanted. That objection may be passed by.] It is also objected that the return does not show that the witnesses were examined apart.(a)

*1003] The commission *requires this: and the proceedings are not to be astutely criticised, but must receive a fair and liberal interpretation; *Atkins v. Palmer*, 4 B. & Ald. 377, 380, *Regina v. Douglas*, 16 Law J. (N. S.), Q. B. 417, *Easter T. 1846*.(b) It must be assumed that the Commissioners have done what was required. Where the examination of a markswoman was taken in support of an order of removal, it was held unnecessary that the jurat should state the examination to have been read over; *Regina v. Birmingham*, 8 Q. B. 410, 418.

Baretow, contra. The order should have given the names of the Commissioners, as well as of the witnesses, and should have specified the time and place of executing the commission. The commission was issued in the exercise of a purely statutable authority; *Attorney General v. Bovet*, 15 M. & W. 60.(c) [Lord DENMAN, C. J. The commission must name the Commissioners; but, surely, the order need not do so.(d) The names of the commissioners may have been one of the "other matters and circumstances" as to which the Judge thought no direction from him was requisite.] The order should have named place, at all events. Under the order in question a commission might have directed the examination to take place in China instead of France. *Steinkeller v. Newton*, 1 Scott, N. R. 148, is in point. In *Clay v. Stephenson*, 3 A. *1004] & E. 807, *application was made to the Court to deviate from the usual practice on very special grounds. (He was then stopped by the Court.)

Lord DENMAN, C. J. The objection cannot be got over. (His lordship read section 4 of stat. 1 W. 4, c. 22.) The statute authorizes the judge "to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction." The order, therefore, must direct the examination at some place out of the jurisdiction: and in this order no place at all is mentioned. The place of the residence of the witnesses is mentioned as being in France; and we can have no doubt that it was intended that their examination should be taken in France: but, unfortunately, the intention is not expressed in the order.

(a) See *Simms v. Henderson*, post, p. 1015.

(b) All the decisions requiring notice, in the several stages of this prosecution, will be reported, with the cases of Trinity vacation 1848, when the judgment on the writ of error was delivered in the Exchequer Chamber.

(c) See *Regina v. Upton St. Leonard's*, 10 Q. B. 327, 335.

(d) See *Nicol v. Alison*, p. 1006, post.

Without entering upon other objections, with reference to which I will only say that every reasonable intendment should be made in favour of proceedings of this kind, I feel constrained to pronounce that the omission to name the place of examination is fatal to this order.

PATTERSON, J. I thought at the trial that the order should contain authority for both the time and the place of examination mentioned in the commission: neither is mentioned in this order. In the case at Nisi Prius (a) before the Lord Chief Baron no order was produced; and the regularity of the commission was presumed. But here the order was produced; and, as neither time nor place was mentioned in it, its effect was to negative any presumption which might have *been made in the absence of such an order. It is for the judge who makes the order to name time and place, and, if there are any particular circumstances requiring it, to mention them also, and to give reasonable directions with respect to them. Where parties agree as to time and place, they can apply to the judge to ratify their agreement. I can see no authority for the time and place mentioned in this commission. [*1005

COLERIDGE, J. I have come to the same conclusion with great regret. Although, if no order had been produced, a presumption might have been allowed that such an order had been made as would authorize the commission, yet, when an order was produced which did not specify either time or place of examination, the commission was unsupported, and fell to the ground. No one can doubt that the statute contemplated that all preliminaries of time and place would be settled on the application to the judge or court for the authority to issue a commission. The fourth section of the statute provides differently for the examination of witnesses within the jurisdiction of the Court and of witnesses out of such jurisdiction. In the former case, the examination is ordered before an officer of court or some other person to be named in the order; in the latter case, a commission is to issue, subject to such reasonable directions touching time, place, and manner of examination, and other matters, as may be contained in the order for a commission or in a subsequent order. I doubt whether, *ex vi termini*, the ordering a commission does not imply the naming of the commissioners. (b)

*WIGHTMAN, J. If the commission only had appeared at the trial, the authority for it might perhaps have been presumed. But an order was put in, not naming the place of examination, a most important matter which ought to have been specified by proper authority: and it is not suggested that this defect was supplied by any subsequent order. [*1006

Rule absolute. (a)

(a) See p. 1002, note (b), *antè*.

(b) See the next case.

(c) Reported by H. Davison, Esq.

See the next two cases.

NICOL v. ALISON. [Feb. 8, 1848.]

Under stat. 1 W. 4, c. 22, s. 4, the order of a Judge for issuing a commission to examine witnesses in places out of the jurisdiction of the Court need not contain the names of the commissioners. The names of such commissioners as the parties agree upon may be inserted in the commission.

The commission need not be tested in term.

ASSUMPSIT for freight, interest, and on an account stated. Pleas, as to all but 600*l.* (paid into Court and taken out): 1. Non assumpsit. Issue thereon. 2. Payment. Replication traversing the payment. Issue thereon. 3. That the causes of action accrued, &c., from defendant and one Cumberlege jointly; set-off for money due to defendant and C. for work done, money paid, &c. Replication, *De injuriâ*. Issue thereon.

On the trial, before ALDERSON, B., at the Yorkshire Spring assizes, 1847, the evidence to establish the set-off consisted of depositions taken, under a commission, at Valparaiso in Chili. The commission issued under an order of the late Mr. Justice WILLIAMS; and the material parts of the order were as follows.

"Upon hearing the attorneys or agents on both sides, and upon reading the affidavits of," &c., "I do order that a commission do forthwith *1007] issue to examine *Juan Antonio Vives" (and six other persons named in the order), "on interrogatories at Valparaiso on behalf of defendant." "And that defendant be at liberty to examine any clerk or agent of defendant's, at all or either of the said places,^(a) to prove the alleged respective payments. That plaintiff be at liberty to cross examine the said witnesses upon cross interrogatories. That the said commissions, when executed, with the interrogatories, cross interrogatories and depositions, be returned to my chambers, in Rolls Garden, Chancery Lane, London, without delay; upon condition," &c. (directions as to costs). "And that, in the event of such commissions issuing, all proceedings be stayed until the return thereof to my chambers. Dated the 8th day of July, 1844. J. WILLIAMS."

The material parts of the commission were as follows.

"Victoria, by the grace," &c. "To," &c. (naming five persons), "all of Valparaiso, in the Republic of Chili, in South America, Esqrs.; greeting. Whereas a certain issue is now depending in our Court before us at Westminster between," &c., "and it has been ruled and ordered by us that Juan Antonio Vives," &c., "and also any clerk or agent of the said defendant, witnesses for the said defendant, shall be respectively examined upon interrogatories by and before certain commissioners to be appointed in that behalf, with liberty for the plaintiff to cross examine the said Juan Antonio Vives," &c., "and such clerk or agent of the said defendant, upon interrogatories to be exhibited to them respectively: Now know ye that we, in confidence," &c., "have appointed

(a) The order directed other commissions to issue for examination of witnesses at places named.

you, and by these *presents do give unto you, any two or more of you, full power or authority diligently to examine the said [*1008 witnesses upon certain interrogatories to be exhibited to them on the part of the said defendant. We therefore command you, any two or more of you, that, at a certain time and place, or times and places, to be by you appointed for that purpose, you cause the said witnesses, and each and every of them, to come before you at Valparaiso aforesaid, and then and there examine and cross examine them and each of them apart, upon the interrogatories aforesaid, on their several and respective corporal oaths first taken before you, any two or more of you, according to the form of their several religions; and that you do take their several and respective examinations and cross examinations, and reduce the same into writing on paper or parchment; and, when you shall have so taken them, you are to send the same without delay to the chambers of The Honourable Mr. Justice WILLIAMS, one of the justices," &c., "in Rolls Gardens," &c., "closed up under your seals, or the seals of any two or more of you, distinctly and plainly set forth, together with the said interrogatories and this writ: and we further command," &c. (directions as to swearing the commissioners, and clerks transcribing, &c., the depositions). "Witness, THOMAS Lord DENMAN, at Westminster, the 12th day of April, in the eighth year of our reign."

It appeared that, after the order had issued, a list of names of persons, proposed as commissioners, was sent, with the order, on behalf of the defendant, to the plaintiff's attorney, who returned the order and list, after having struck out certain names; and that the commission afterwards issued with the names which *were not so struck out. It was objected, on the part of the plaintiff, that the [*1009 commission was void because the order did not itself specify what persons were to be commissioners; and because the commission ought to have been tested of a day in term. A further objection was, that some of the witnesses were neither named in the commission nor shown to be either clerks or agents of the defendant.(a) It was referred to a barrister to certify how much of the defendant's claim was proved, and what part of the sum so proved was proved by persons who could be identified as witnesses named in the commission or as clerks or agents of the defendant. And a verdict was taken for the defendant, with leave to move to enter a verdict for the plaintiff. The barrister certified that, if the amount of all the disbursements proved under the commission were allowed, there ought to be a verdict for the defendant; but that, if such only were to be allowed as were proved by witnesses named or identified as above-mentioned, there ought to be a verdict for 1917.; and that, if none of the evidence given under the commission was admissible, there ought to be a verdict for the plaintiff for the whole amount claimed by him.

(a) Some other objections were taken, which were abandoned on the argument in banc.

In Hilary term, 1847, *Knowles* obtained a rule nisi to enter a verdict for the plaintiff for 191*l.*, or 360*l.* 10*s.* 9*d.* with interest.

Watson now showed cause. First, the objection as to the teste does not apply to a commission of this kind. The rule that the teste must be in term time extends only to common law writs: but this commission *1010] takes effect by stat. 1 W. 4, c. 22, s. 4. Such a commission may issue by order of a Judge in vacation. It would be very inconvenient if the rule contended for on the other side were the true one; for then no commission could issue from the end of Trinity term till the commencement of Michaelmas term. Besides, the commission here did issue on the 12th of April, which is the essoign day of Easter term: essoigns are preserved by stat. 11 G. 4 & 1 W. 4, c. 70, s. 6. Secondly, it was not necessary that the order should specify the names of the Commissioners. The necessity was insisted upon in *Greville v. Stulz*, antè, p. 997; but the objection which prevailed there was that the order did not name the place. Here the plaintiff approved of the Commissioners named in the commission before it issued: any objection to the order is therefore waived. Thirdly, as to the witnesses: the Court will give credit to the Commissioners for having executed the commission properly; *Atkins v. Palmer*, 4 B. & Ald. 377, 380. [Lord DENMAN, C. J. We are of opinion at present that the objections to the commission cannot prevail: but, as to the witnesses, the barrister's certificate as to the amount proved by proper witnesses was evidently intended by both parties to be final.]

Knowles and *Hugh Hill*, contrà. First, the commission, like all other writs, must be tested in term time. [WIGHTMAN, J. Why do you call it a writ?] It has the seal of office, formal commencement and teste of a writ; and it goes through the writ office. [WIGHTMAN, J. What writ is it?] A writ of commission. [WIGHTMAN, J. I never heard of a writ so *1011] called.] It is not addressed, like ordinary writs, to the sheriff; but that does not deprive it of its character of writ. A subpoena is a writ addressed to a witness: a mandamus is a writ addressed to the party commanded. Every act of the Court, commanding that an act be done, seems to have the character of a writ. It is not the less a writ for being a commission: a writ of error is a commission. (a) And a writ of error is quashed if the record of the Court below does not correspond with the description in the writ; *King v. Simmonds*, 7 Q. B. 289, 313. [WIGHTMAN, J. Suppose there had been no teste.] Whatever the presumption might then have been as to the proper issuing, here a teste does appear, which is not in term. But there must be a teste; else the authority of the Court does not appear. [WIGHTMAN, J. Suppose you found the words "By the Court," followed by the seal of the Court.] It may be possible to point out cases in which the authority of the Court might be shown otherwise than by the teste: but here it appears by that only. The general rule, that the teste must be in term, appears by stat. 3 & 4 W.

(a) See note (1) to *Jaques v. Caesar*, 2 Wms. Saund. 100.

4, c. 67, s. 2, which permits a variation from the practice in certain cases, of which this is not one. A writ of subpoena tested in vacation is void; *Edgell v. Curling*, 7 M. & G. 958.(a) Secondly, the names of the commissioners should have been inserted in the Judge's order. The commission itself derives its authority entirely from stat. 1 W. 4, c. 22, s. 4; and that section authorizes the Court or Judge to order a commission to *issue, "and by the same or any subsequent order or orders to [*1012 give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just." It cannot be said that the selection of the parties who are to be inserted in the commission as commissioners is not to be included among such "all other matters and circumstances." The proceeding of the plaintiff here, in sending back the order, amounts to a consent, not to the insertion of names not mentioned in the order, but to the order itself. The names are surely more important than the place: yet the latter must appear in the order; *Grevill v. Stulz*, ante, p. 997. [PATTERSON, J. By sect. 5, the witnesses are to be named in orders respecting examinations to be taken within the jurisdiction of our Courts: but no such provision is made, by sect. 4, where the examinations are to be taken abroad. That is because in the former case the witnesses are within the reach of this Court, in the latter, not.] That distinction will not apply to the names of the commissioners. In *Clay v. Stephenson*, 3 A & E. 807, this Court directed that a commission should issue, addressed to individuals who were Judges of a foreign Court: the order, however, was drawn up for a commission addressed to the Court itself: and afterwards, when the case came before this court again,(b) PATTERSON, J., said that the order was drawn up quite contrary to the intention of the Court; and he stated that he mentioned this as a caution for the future. *This shows the importance of designating the Commissioners [*1018 in the order.

Lord DENMAN, C. J. Calling this commission a writ will not involve, as a consequence, the attaching to it all the properties of a common law writ. I am of opinion, further, that it is not necessary that the names of the commissioners should be in the order: and here the party who now impugns the commission did, by objecting to some only of the names, assent to the rest. As to the question of amount, it clearly was left to the barrister to determine finally how much was proved by witnesses who were admissible under the commission.

PATTERSON, J. Stat. 1 W. 4, c. 22, provides for three cases. Under sect. 1 the commission goes to courts in places abroad within Her Majesty's dominions: that is certainly a writ; the words are "writ or com-

(a) And, as to the teste of a writ of mandamus, see *Regina v. Conyers*, 8 Q. B. 981.

(b) *Clay v. Stephenson*, 7 A. & E. 185, 188.

mission." Next, by sect. 4, the examination of witnesses within the jurisdiction may be ordered. Thirdly, by the same section, the superior Courts, or a Judge of them, may "order a commission" to issue, to be executed at places out of the jurisdiction. The Courts might issue a commission without any formal order at all. I think, therefore, that an order for a commission need not name the persons who are to be in the commission. Sect. 4 requires that the order shall give directions as to the place: that probably is because the Judge may see that the execution of the commission would be more convenient at one place than another. But he could not well fix upon the commissioners during the *1014] application at chambers: the parties *therefore may name them: and perhaps it might be as well to insert in the order an express direction that the commissioners should be named by the parties. As to the teste, I do not see that this, if it be a writ, is so in that strict sense of the term which the argument in support of the rule requires.

WIGHTMAN, J.(a) I am quite of the same opinion. It is argued that the commission is a writ. Perhaps it may be so called: but the question is whether it has all the incidents of common law writs. It is said that this commission is informal, because it is not tested in term, like other writs which, though in fact they may issue in vacation, must appear to issue in term. But, whatever you call this commission, it derives its authority from stat. 1 W. 4, c. 22; and under that statute, either the Court or a Judge may order the commission to issue, and this in vacation as well as term time. We cannot import a requisite that all common law rules are to attach to that which by statute may issue in vacation as well as term time. I think it doubtful whether any teste at all, properly so called, be requisite. It is sufficient that the act appears to be done by the authority of the Court, which a Judge may put in motion. As to the order, the statute does not require that it should contain the names: in practice that is not done: the parties name the commissioners; and the Court admits those who are so named.

Verdict to be entered for 1911.

(a) COLERIDGE, J., had left the Court before the argument began.

*1015] *CHARLES SIMMS and JOANNA CHARLOTTE,
his Wife, v. BETHEL HENDERSON.

HENDERSON v. HENDERSON.(a)

A Judge's order, in December 1845, directed a commission to issue for the examination of certain witnesses *vivâ voce* at Newfoundland, returnable on the last day of Trinity term then next. The commission, issued in pursuance of this order, was addressed to certain Commissioners, described as "of St. John's in the island of Newfoundland," and commanded that, "at a

(a) The pleadings were the same in both actions.

certain day and place or certain days and places to be appointed" by them, they should cause the witnesses to come before them "at Newfoundland, and then and there examine each of them the said witnesses apart."

The commission was sent by post to the said Commissioners, in the beginning of 1846. At the end of May 1846, a sealed packet was left at the Master's office by a person not known: it contained the commission, the return to it, and the examinations of the witnesses signed by the persons named as commissioners, who were proved to have been living at St. John's, Newfoundland, where the return purported to have been made, seven years before the alleged return, and three months after it. The return and examinations were produced in the same state as when left at the Master's office, and bore no mark of alteration.

Held, that the order gave sufficient directions as to "the time, place, and manner" of examination, under sect. 4 of stat. 1 W. 4, c. 22, and that the commission was warranted by this order. That there was sufficient proof of the return, without further evidence to show that the examinations were in the same state as when sent forth by the Commissioners. And

That it must be presumed that the witnesses were examined apart.

Debt, on a decree on the equity side of the Supreme Court of Newfoundland. Plea, that the decree was made in respect of matters stated in a certain amended bill; that, at the time of filing this bill, defendant was, and thence hitherto hath been, and still is, resident out of the jurisdiction of the said Court; that he was never served with any copy of the amended bill, and never had notice of any process calling upon him to answer it; and that the proceedings on it were taken in his absence and *ex parte*.

Replication. That, at the commencement of the suit, defendant was within the jurisdiction, and was duly served with process to answer the original bill, which was the bill afterwards amended. That defendant afterwards, and while he was within the jurisdiction, appeared, and appointed E. to be his attorney in the suit, and E. became his attorney authorised to conduct his defence therein; and was, during all the time after mentioned, within the jurisdiction; that afterwards, while E. was such attorney for defendant, and so authorised, the original bill was amended; that afterwards, and before decree, and while E. continued to be such attorney and so authorised, E. had notice of the amended bill, and was served with process calling upon defendant to answer the amended bill; and such proceedings were thereupon had, that the decree was made.

Rejoinder. That E. had not notice of the amended bill, made *et forma*. Issue thereon.

Held, that this rejoinder did not put in issue the service of process to answer the amended bill, or anything except notice of the bill.

That the replication was good after verdict, as the meaning of the replication was that E. had authority from defendant to act as attorney for him in respect of the amended, as well as of the original, bill; and that defendant, by pleading over to this allegation, and merely traversing the notice to E., admitted that the replication was to be taken in the sense in which it must have been intended, namely that which made the replication valid; and that the authority, understood in this sense, would support the decree, whatever might have been the practice in Chancery in respect of an ordinary retainer of an attorney to appear to an original bill.

THE declaration in *Simms v. Henderson* was in debt, on a decree of the Supreme Court of Newfoundland, on the equity side, ordering payment of a sum of money by defendant to plaintiffs.

*The defendant pleaded ten pleas. The fourth, sixth, seventh, eighth, ninth, and tenth led to demurrers, on which judgment [*1016] was given for the plaintiffs.^(a) The fifth is the only plea which is material to the points reported.

Plea 5. That the decree and sentence in the said declaration mentioned were made upon and in respect of the matters stated in a certain amended bill, filed in the said Court in the action mentioned; and that, before and at the time of the filing of the said amended bill, defendant was, and thence hitherto hath been and still is, out of, and resident out

(a) See *Henderson v. Henderson*, 6 Q. B. 288, which is the same with the case of that name here reported, and in which judgment was given for the plaintiff on demurrer to pleas 4, 6, 7, 8, 9, and 10.

of, the jurisdiction of the said Court; and that he was never served with any copy of the said bill, and never had notice of any process calling upon him to answer the said bill; and that the proceedings in the said Court towards and in making the said decree were proceedings had and taken in his absence and ex parte. Verification.

Replication. That, at the time of the commencement of the suit wherein the decree in the declaration mentioned was pronounced and made, to wit, on 13th December, 1832, the defendant was within the jurisdiction of the said Court, and then, and whilst he was within the said jurisdiction, was duly served with, and had notice of, process sued forth of the said Court by which the decree was pronounced and made, calling upon him, defendant, to answer a certain original bill of complaint in the said suit, which had been then duly *filed in the *1017] said Court, and was the bill which was afterwards amended, as in the said plea and hereinafter alleged; and which said original bill of complaint was the first proceeding in the said suit: That defendant did afterwards, long before the making of the said decree, and while he was within the said jurisdiction, to wit, on 24th July, 1834, appear in the said Court, and did then appoint one Hugh Alexander Emerson, an attorney of the said Court, to be the attorney for him, defendant, in the said suit; and the said H. A. E. then accordingly became and was the attorney for defendant and authorized to conduct his defence in the said suit, and was, from thence continually at and during the several times hereinafter mentioned, and until the making of the said decree, within the jurisdiction of the said Court. That afterwards, while H. A. E. continued to be, and was, such attorney for defendant, and so authorized as aforesaid, the said original bill was amended, and the said amended bill filed by leave of the said Court, after hearing counsel on behalf of defendant. That, after the filing of the said amended bill, and a reasonable time before the making and pronouncing of the said decree, and while H. A. E. continued to be, and was, such attorney, and so authorized as aforesaid, to wit, on 5th May, 1837, H. A. E. had notice of the said amended bill, and was then served with process sued forth of the said Court in the said cause, calling upon defendant to answer the said amended bill: and such proceedings were thereupon had that afterwards, to wit, on 2d June, 1841, the said decree was so made in and by the said Supreme Court of Newfoundland, in manner and form as in the declaration mentioned. Verification.

*1018] Rejoinder: that H. A. E. had not notice of the said *amended bill, in manner, &c.: conclusion to the country. Issue thereon.

On the trial of the cause, *Simms v. Henderson*, before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1846, the plaintiffs, in support of this issue, first put in evidence an order made by Lord DENMAN, C. J., in December, 1845, for a commission to examine witnesses. The order, which was entitled in both *Simms v. Henderson* and

Henderson v. Henderson, ordered that a commission should issue in the first-mentioned cause, directed to commissioners to be appointed as in the order directed, to take evidence by the examination of two persons therein named, and others, as witnesses on behalf of the plaintiffs, "vivâ voce, at Newfoundland, before such commissioners or any two or more of them, returnable on or before the last day of Trinity term next, or within such further time as any Judge may order." "And I further order that the said commission, and the depositions taken themselves, shall be returned to the office of the Masters of this Court, to be received in evidence on the trial of the said first-mentioned cause, saving all just exceptions." The order also directed that the same commission and depositions should in like manner be evidence in the second-mentioned cause also.

A commission issued, in the same month, in pursuance of this order, was then tendered in evidence. The commission was addressed to three Commissioners, described as "all of St. John's in the island of Newfoundland:" and it empowered any two or more of them to examine the witnesses vivâ voce, and commanded that, "at a certain day and place, or certain days and places, to be appointed by you for that purpose, you cause the said witnesses to come before *you in Newfoundland, [*1019 and then and there examine each of them the said witnesses apart," &c. The commission required the Commissioners to reduce the examination so taken into writing: "And when you shall have so taken them, you are to send the same, on or before the last day of Trinity term next, or such further time as any Judge," &c. "shall direct, to our said Court before us at Westminster, closed up under your seals or the seals of any two or more of you distinctly and plainly set, together with the several questions proposed," &c., "and the answers to such questions, and this writ, to be filed of record in the office of the Masters of the same Court," &c. It was objected, for the defendant, that this commission was not admissible, because it was not warranted by the order, the order having omitted to give such "directions touching the time, place, and manner of such examination," as are required by stat. 1 W. 4, c. 22, s. 4; and *Greville v. Stulz*, antè, p. 997, was referred to. His Lordship received the evidence.

The return and depositions were then tendered. They were produced by a clerk from the Master's office, who stated that a packet sealed up, with the superscription "To the Court of Queen's Bench. Charles Simms and Johanna his wife against Bethel Henderson. Return to commission for examination of witnesses, &c.," and containing the commission, return, and examinations produced, had been brought to him at the end of May last, by a person whom he had never seen before or since. It was also proved that the commission returned was the same which had been issued, and that it had been sent by post addressed to the persons appointed Commissioners at Newfoundland shortly after it issued;

*1020] *that the signatures of the persons by whom the return purported to have been made were the signatures of such Commissioners; and that they were living at St. John's in Newfoundland, at which place the return purported to have been made, about seven years before the return, and, also about three months after it. The return and depositions exhibited no traces of interlineation or erasure. The depositions contained separate examinations. It was objected that evidence should have been given that the return was in the same condition as when sent by the Commissioners, and also that the witnesses were examined apart. These objections were overruled. The examinations contained evidence that Emerson had notice of the amended bill. It was objected that this was insufficient, as the rejoinder also put in issue the averment that Emerson was served with process to answer the amended bill.

Lord DENMAN, C. J., directed a verdict for the plaintiffs,^(a) and gave the defendant leave to move to enter a nonsuit. A verdict was taken in the case of *Henderson v. Henderson* also, subject to the same objections.

Barstow, in Hilary term, 1847, obtained a rule nisi to enter a nonsuit, or to arrest the judgment on the ground that the replication did not show any authority in Emerson to act for the defendant except in the original suit.

The case was argued in last Michaelmas vacation.^(b)

Sir *F. Kelly*, *E. J. Lloyd*, and *H. Hill* showed cause. The directions *1021] given by the order respecting the place *and time for executing the commission are sufficient. The commission is to be returned before a certain day; this is a sufficient limitation of time; greater particularity was superfluous, and impracticable also, for the length of the voyage was uncertain. Then, as to place: Newfoundland is named; this is sufficient to show that the commission was to be executed at a place within the provisions of stat. 1 W. 4, c. 22: no more was necessary. If more was necessary, how much more? Must the street be named, or even the building, in which the commission is to be executed? As to the proof of the return, whatever strictness may prevail in courts of equity, the courts of common law in these proceedings exercise a statutable authority; and it was proved that the return was the return of the Commissioners, and also, as there were no interlineations or erasures, that it was produced at the trial in the same condition as when sent by the Commissioners. As to the objection that the return does not state that the witnesses were examined apart, the proceedings are entitled to a fair and liberal interpretation; and it is to be presumed that they were examined apart; *Regina v. Douglas*, 16 Law J. (N. S.) Q. B. 417.^(c) The

(a) There were issues of fact also on the first, second, and third pleas; on which the plaintiffs had a verdict.

(b) December 6th and 7th. Before Lord DENMAN, C. J., PATTERSON, WIGHTMAN, and KEIL, Jc.

(c) See p. 1003, note (b), ante.

examinations completely established the issue, which excluded any question as to service of process to answer the amended bill. Lastly, the replication is good. It states that Emerson had notice of the amended bill, and was served with process to answer it while he continued defendant's attorney.

They then cited authorities on the practice of the Court of Chancery in allowing service of process to answer an amended bill on the attorney in the original *suit. This point was more fully argued on a subsequent day in *Henderson v. Henderson*: and the ground on which the judgment of the Court in the two cases proceeded renders any detail of this part of the argument unnecessary. [*1022

Barstow and H. R. Bagshawe, contra. Stat. 1 W. 4, c. 22, s. 4, is peremptory in requiring that the order should give directions as to the time and place for executing the commission; as to "all other matters and circumstances," it may be that it is left to the Judge's discretion whether he will give any directions about them. Considering the great extent of the country described as Newfoundland, the order, virtually, gives no directions as to place; and it, literally, omits any direction as to time. Perhaps it would have been sufficient if the order had expressly reserved power to the Commissioners to fix place and time; but it has not done so, and therefore does not warrant the commission. Then, the return was not properly proved: some person should have testified that he had received it from the hands of the Commissioners. The practice of the Court of Chancery is quite reasonable in this respect; the messenger who brings the return makes oath that he himself had it from the Commissioners, and that it is in the same state as when he received it; *Cox v. Newman*, 2 Ves. & B. 168, 170. Section 10 of stat. 1 W. 4, c. 22, under which the courts of common law act in issuing these commissions, dispenses, under certain specified circumstances only, with proof of the signature of the Commissioners: the common law courts, therefore, should be at least as strict as the Court of Chancery in requiring the return *to be authenticated. It is not to be presumed that the witnesses were examined apart. The Court of Chancery will not presume even that the Commissioners have taken the oaths prescribed to them before acting; *Brydges v. Branfill*, 12 Sim. 334. The issue on the plaintiffs' part was not satisfied without proof that Emerson had been served with process to answer the amended bill. The rejoinder traverses the notice of the amended bill *modo et formâ*; every part of the replication is important; and it is clear that the replication means that Emerson had notice of the amended bill by service of process to answer. (They then contended that the replication was bad.)

Cur. adv. vult.

At the close of the above argument, it was arranged that counsel should be heard in *Henderson v. Henderson*, on the question whether it appeared, on the record, that the decree had been made under circumstances which

this Court could see to be such as would render its enforcement a violation of justice. In Hilary term, 1847,(a)

E. J. Lloyd showed cause. The record shows that Emerson was appointed by the defendant his attorney in the suit; and that the bill was amended, and notice thereof given to Emerson, and process served on him, while he continued attorney in the suit. The fact of the notice is the only matter traversed; and the traverse is found for the plaintiff. After verdict, the untraversed allegations must be understood as asserting that Emerson was authorized to act in the suit in which *the

*1024] decree referred to by the declaration was made, that is, as attorney, not simply for the purpose of dealing with the original bill, but throughout. That being so, there is nothing repugnant to natural justice in holding that notice to Emerson was notice to the defendant. Whether or not this is consistent with the practice of the Supreme Court of Newfoundland cannot be inquired into in the present proceeding, but was a question for that Court, or upon appeal from it; *Ex parte Smyth*, 3 A. & E. 719, *Martin v. Nicolls*, 3 Sim. 458 (which, as to a foreign judgment, is not actually overruled by *Houlditch v. Donegal*, 8 Bligh, N. S. 801, 842), *Henderson v. Henderson*, 6 Q. B. 288, 3 Hare, 100, 113, 117, in this Court and before WIGRAM, V. C. Further, the course is correct as a matter of practice. (On this point he referred to *Roberts v. Worley*, 2 Cox, 389, Orders in Chancery of 3d April 1828, 20, 1 *Smith's Chan. Prac.* 560,(b) stat. 5 G. 4, c. 67, 1 *Daniell's Practice*, p. 417 (2d ed.), *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 238, *Hobhouse v. Courtney*, 12 Sim. 140, *Murray v. Vipart*, 1 Phill. R. 521, *Sewell v. Godden*, 1 De Gex & Sm. 126.

H. R. Bagshawe, contra. The record in fact shows no more than that Emerson was an attorney in the suit as to the original bill. This being so, the decree has passed against the defendant on the amended bill, without his having been called upon. That is contrary to natural justice; *1025] and the result is an absence of *jurisdiction in the Supreme Court of Newfoundland. The general doctrine, therefore, that the proceedings of a competent Court can be examined only on appeal, does not apply, the Court not being competent here, for want of jurisdiction. Then, if the question turn on the practice, the proceeding cannot be supported. (He commented on the authorities cited on the other side, and referred also to *Pennington v. Lord Muncaster*, 1 Madd. 555, and *The Marquis of Hertford v. Suisse*, 13 Sim. 489. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (May 9th), delivered the judgment of the Court.

In this case a rule for a new trial was moved for upon objections to the commission for examining witnesses. But it appears to us that the place, the time, and the manner of examining witnesses were regularly

(a) January 12th. Before Lord DENMAN, C. J., PATTERSON, WIGHTMAN, and ERLE, J.

(b) See orders of 8th May, 1845, i. xxvi.; 1 *Phillips's Rep.* lxi. lxxix.

provided for, as they were to be examined *vivâ voce* at Newfoundland before the return day of the commission. It is to be presumed that they were examined apart, as the depositions purport to contain separate examinations, and there is no reason for supposing that they were examined together; and the presumption is that the Commissioners did their duty. There was more than sufficient proof of the due return of the commission.

The defendant has further objected that judgment ought not to be given for the plaintiff by reason of the facts appearing on the fifth issue. The declaration alleges a regular decree. The fifth plea alleges that the decree was made in respect of an amended bill, *and that before the filing thereof the defendant was out of the jurisdiction of the Court, and has so continued; that he was not served with a copy of such bill, and had no notice of any process thereon, and that the proceedings were taken in his absence and *ex parte*. The replication thereto alleges that at the commencement of the suit the defendant was within the jurisdiction, and was duly served with process in respect of the original bill in the suit, and appeared, and appointed H. A. Emerson to be the attorney for him the defendant in the suit, and Emerson accordingly became the attorney of the defendant and authorized to conduct his defence in the suit; and that, while he was such attorney so authorized, he had notice of the amended bill. The rejoinder traverses the notice; and the issue thereon is found for the plaintiff. [*1026]

Upon these pleadings the defendant has contended that Emerson had no authority to act as the attorney of the defendant in respect of the amended bill, because it was said that, by the rules of practice in the Court of Chancery, an authority to act as attorney in respect of an original bill was no authority so to act in respect of an amended bill. But we take it to be clear that the plaintiff intended to allege that Emerson had authority from the defendant to act as attorney for him during the whole suit, and as well in respect of the amended bill as of the original bill; and that the defendant, by pleading over to this allegation and merely traversing the notice to Emerson, admits that it is to be taken in the sense which the plaintiff must have intended, *viz.* the sense which makes the replication valid. Now, if an authority was given by the defendant, about to leave the jurisdiction, to an attorney to act for him in *respect of the original and all amended bills that might be filed in the suit, such authority would support the present decree, [*1027] whatever may have been the rules of practice in the Court of Chancery in respect of an ordinary retainer to an attorney to appear to an original bill. After the plaintiff has incurred the expense of a trial upon an issue chosen by the defendant, justice and the rules of law require that we should endeavour so to construe the pleadings as to make the trial effective.

The judgment therefore is for the plaintiff. Rule discharged.(a)

(a) The case of *Simms v. Henderson* is reported by H. Davison, Esq.

*1028]

*EASTER VACATION.(a)

The QUEEN v. FONTAINE MOREAU. *May 18.*

F. was indicted for perjury committed by deposing, in an affidavit in a cause wherein he, F., was plaintiff, and E. defendant, that E. owed him 50*l*. Held that, in support of this indictment, evidence was not admissible that the cause of F. against E. was, after the making of the affidavit, referred by consent, and an award made that E. owed nothing to F.

INDICTMENT in the Central Criminal Court. The first count charged that Peter Armand Leconte de Fontaine Moreau, late of, &c., wilfully and maliciously contriving, &c., to aggrieve one Emile Encontre, and unjustly and maliciously to cause him to be arrested for the sum of 50*l*. by virtue of a certain writ, &c., to be sued out and prosecuted at the suit of him, defendant, on, &c., at, &c., came in his own proper person, before Sir JOHN WILLIAMS, Knight, since deceased, then being one of the Justices of the Court of Queen's Bench, and then and there produced a certain affidavit in writing of him, defendant, and then and there, before the said Sir J. W., in due form of law was sworn, &c., the said Sir J. W. then and there having lawful and competent power, &c., to administer, &c.; and that defendant, being so sworn as aforesaid, &c., then and there, upon his oath aforesaid, before the said Sir J. W., the said Sir J. W. then and there having lawful, &c., falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing, did depose and swear (amongst other things) in substance, &c.: That Emile Encontre, late of, &c., but then of, &c., in the county, &c. (meaning *1029] thereby the said E. E.), then was justly and truly *indebted to the then deponent (meaning thereby himself (a)) in the sum of 50*l*. and upwards, for work and labour done by the then deponent for the said E. E.; and also for money lent and advanced to, and paid, laid out, and expended by the then deponent for the use of, the said E. E., and at his request: Whereas, in truth and in fact, at the time the defendant took his said oath, &c., and made his affidavit aforesaid, he, the said E. E., was not justly and truly indebted to the defendant in the sum of 50*l*. and upwards, for work and labour, &c.; and also for money lent and advanced, paid, laid out, and expended by him, &c.; and whereas the said E. E., at the time the defendant so swore and made affidavit as aforesaid, was not indebted to him, defendant, in the sum of 50*l*. and upwards, on any account whatever; but was indebted to him in a small sum of money only, under the sum of 20*l*., to wit, 15*l*. 1*l*s. and no more, as defendant, at the time he so swore and made affidavit as aforesaid, well knew. And so the jurors, &c. (the common conclusion, finding perjury.)

(a) The Court sat on the 13th and 15th of May.

(b) There were similar innuendoes after every subsequent mention of the prosecutor and defendant respectively.

Count 2. That, before the commission of the offence after mentioned, an action of debt had been commenced in the Queen's Bench, in which action the present defendant was plaintiff and the said E. E. was defendant: that the present defendant, contriving, &c., wrongfully and without just cause to induce the said Sir J. W., Knight, deceased, then being one of the Judges, &c., by a certain special order of him, Sir J. W., to direct that the said E. E. should be held to bail in a large sum of money, to wit, 50*l.*, and further contriving, &c., wrongfully, &c., to sue out a *writ of capias against E. E., whereby E. E. might be arrested, afterwards, and before final judgment had been obtained in the [*1080 said action, to wit, &c., at, &c., came, &c.: the count then alleged the coming before Sir J. W., production of affidavit, and swearing as in the first count: and the deposition was then set out, and perjury assigned as in the first count.

The indictment was removed into this Court: and the defendant pleaded Not guilty.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after Trinity term, 1847, it was proved, on behalf of the prosecution, that the affidavit was made as alleged in the indictment, and that the cause mentioned in the second count, in which that affidavit was sworn, came on for trial, after the finding of the bill of indictment, at the Surrey Spring assizes, 1847. The cause and all matters in dispute between the parties were referred by consent to a barrister. It appeared that in that action the plaintiff, the present defendant, claimed two items of 27*l.* 2*s.* 8*d.* and 11*l.* 12*s.* 1*d.*, which, together with 15*l.* 11*s.* (admitted in the present indictment to be owing from the prosecutor to the now defendant), would make up 54*l.* 5*s.* 9*d.*, so as to satisfy the affidavit. The arbitrator, however, awarded that the prosecutor owed nothing to the now defendant. This award was offered in evidence, on the part of the prosecutor, to show the falsehood of the affidavit, and, after objection made, was admitted. Verdict, Guilty.

In Michaelmas term, 1847, Sir F. Theiger obtained a rule nisi for a new trial, on account of the reception of this evidence. In last term, (a)

**Shee*, Serjt., and *Bovill*, showed cause. The evidence is ob- [*1081 jected to, on the ground that the parties to the original action and to the arbitration are not identical with the parties upon this indictment, who are the Crown and the defendant: and reliance is placed on 1 Stark. Ev. 261 (8d ed.), which contains the substance of the argument urged in support of the motion: "It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence the parties must be the same, for then the benefit and prejudice would be

(a) April 27th, 1848. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ELLIS, Js.

mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for and (a) between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point. And the verdict ought not to be admitted to prejudice the jury against the former litigant. Besides, the former verdict may have been obtained upon the evidence of the party who afterwards seeks to take advantage of it; and this is one reason why a conviction upon an indictment at the suit of the King is not evidence in a civil action. From the principles announced, it seems to be a general consequence that a verdict in a civil proceeding will not be evidence either against or for a party in a criminal proceeding. The acquittal in an action ought not to be admitted as evidence in *1032] bar of an indictment, because the parties are not the same, and the King or the public ought not to be prejudiced by the default of a private person in seeking his remedy for an injury to himself; especially as upon the trial of the indictment the testimony of the former plaintiff is admissible, which was before excluded by his being a party to the cause. By such additional evidence the jury may be induced to come to a contrary conclusion. Neither, as it seems, is a verdict for the plaintiff in a civil action evidence upon an indictment; (b) for although the defendant has had the opportunity to cross-examine the witnesses and controvert the testimony of his opponent, yet it would be hard that upon a criminal charge, which concerns his liberty, or even his life, he should be bound by any default of his in defending his property. In addition to this, there is a want of mutuality; the parties are not the same, and the party would lose the privilege of proceeding against the jury in case of a false verdict, by attaint." Now the objection arising from the party having been a witness does not exist where it is sought to give a civil proceeding in proof of an indictment, because the party cannot have been a witness in the first proceeding, but may be a witness in the second. [Lord DENMAN, C. J. I received the evidence only because I thought that the arbitrator was a person selected by the parties to try the fact. I think that is the only ground upon which, if at all, my ruling can be supported.] That principle is sufficient: as between the two parties the fact is conclusively found. The case is stronger than that of a judgment in invitum. *1038] [COLERIDGE, J. Mr. *Roscoe (c) cites, from 2 Phil. Ev. 203, 7th ed., a ruling of Lord TENTERDEN, at *Nisi prius*, that a plea of Guilty to an indictment for assault could not be given in evidence against

(a) "As"?

(b) Mr. Starkie refers to the Trial of the Duchess of Kingston, 20 How. St. Tr. 355. He cites vol. ii. p. 222, of the foll. (Hargraves) edition, corresponding with vol. 20, pp. 465—471, of the 3rd. (Howell's.)

(c) Digest of the Law of Evidence, &c., at *Nisi Prius*, p. 139 (7th ed.). It seems, however, that Mr. Phillips cites the decision as a holding that such evidence is not conclusive as to his guilt, vol. ii. p. 523, 8th ed., and 9th ed. vol. ii. p. 25, where he says that the evidence "seems, at least, to be admissible." Mr. Phillips refers to Lamb Eiren. B. IV. c. 9, p. 530 (ed. 1619), where Yearb. Pasch. 11 H. 4, fol. 65 A, pl. 21, and Hil. 9 H. 6, fol. 60 A, pl. 8, are cited.

the same defendant when sued in a civil action for the same assault.] A plea of Guilty, in such a case, is often rather a matter of arrangement than an avowal of guilt. [Lord DENMAN, C. J. I do not think Lord TENTERDEN could have ruled so: why does what a man says of himself cease to be evidence by being said in Court?] Mr. Phillipps, accordingly, puts it as "in the nature of an admission;" vol. ii. p. 25 (9th ed.). In *Rex v. Inhabitants of St. Pancras*, 1 Peake's N. P. C. 219, Lord KENYON distinguished between the effects of acquittals and convictions as evidence in after proceedings: the latter he held conclusive.

Sir *F. Thesiger* and *T. Jones*, *contra*. The award cannot be put on any higher ground than the verdict of a jury. The objection arising from a party to a civil cause having possibly been a witness in a criminal proceeding cannot be the foundation of the rule which excludes one proceeding from being evidence in another: the judgment of the Court of Exchequer in *Blakemore v. Glamorganshire Canal Company*, 2 C. M. & R. 133, 139, S. C. 5 Tyrwh. 603, 609, seems to negative this principle. The rule must therefore rest on principles common to the two cases: of a criminal *proceeding offered in proof in a civil case, and [*1084 *vice versa*]. Now, that a verdict or sentence in a criminal proceeding is not evidence in a civil action, appears from *Brownsword v. Edwards*, 2 Ves. sen. 243, 246, and *Gibson v. M'Carty*, Ca. K. B. Temp. Hard. 311. The real objection is the want of mutuality, arising from the parties not being identical, which was insisted on by PRATT, J., in *Jones v. White*, 1 Str. 68, and which was assumed as valid by Lord TENTERDEN, in *Ward v. Wilkinson*, 4 B. & Ald. 410, 412. That is the ground on which the objection is put in 2 Phil. Ev. 23 (9th ed.); and it is also insisted on in Professor Greenleaf's *Law of Evidence*, s. 537, p. 575 (ed. 1842), and noticed in *Gilb. Ev.* p. 27, 28, 6th ed. But, further, the question was not the same in these two cases. The issue on the indictment involved knowledge by the defendant that the fact was the contrary of what he swore it to be: the fact alone is in question in the civil cause. [Lord DENMAN, C. J. The fact is one step in the proof of the indictment. If the defendant had referred to his clerk for the state of the account, would not the clerk's declaration be evidence on the indictment?] The clerk would be the agent of the defendant. But the arbitrator is not such agent: he takes the place of the jury for the purpose of ascertaining a fact which, after issue joined, must be decided one way or other. His being substituted for the jury cannot invest him with the character of an agent entitled to make an admission. [COLERIDGE, J. The defendant agreed to be bound, in the civil issue, by the award.] That is all. [*Bovill* referred to the case of an order of removal not appealed against, which proves the settlement as between any parties. COLERIDGE, J. That is in the nature of a *judgment in rem.(a)] It was held, in *Rex v. The Warden of the Fleet*, [*1085

(a) See *Regina v. Phillips*, 8 Q. B. 745, 754.

12 Mod. 387, 389, that a conviction of battery would not be evidence in an action for the same battery, nor vice versa; and that records of conviction or verdicts could not be given in evidence where the benefit would not be mutual. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

This was an indictment for perjury in an affidavit to found an application for a *capias*, alleging that the defendant in that suit, the prosecutor of this indictment, was indebted to him in the sum of 50*l*.

In order to prove the falsehood of that allegation, an award was put in evidence at the trial. After the indictment was found, the cause between the parties came on at the assizes, and was then referred to the arbitration of a barrister, who decided in favour of the defendant, that he owed nothing to the plaintiff. His award is the document objected to, but admitted.

On a motion for a new trial on this ground, we are of opinion that it was improperly received; not because the untruth of the statement was not necessarily inconsistent with the defendant's believing it to be true; for his knowledge of its falsehood would require to be proved by other evidence; but because the decision of the arbitrator in respect of that fact is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against the party to be affected by the proof of it in any criminal case.

Rule absolute.(a)

(a) On a second trial the defendant was acquitted.

*1036] *DOE, on the demise of THOMAS TREVORIAN MILLETT,
v. JOHN NICHOLAS RICHARDS MILLETT. May 13.

Lands came to M. D. and E. as co-parceners, by devise. M. married; and then M. and her husband, and D., suffered a recovery of their portions to the uses, respectively, of M.'s husband for life, remainder to M. for life, remainder to the heirs and assigns of the survivor, and of D. in fee. Afterwards D. and E. married; and, by agreement, in 1758, recited to be "*for drawing a deed of partition*," the three husbands agreed to take the devised property and other premises which had come to the wives as co-heiresses, at certain specified values, and to share the money arising from the estates by means of that division, share and share alike: and it was declared that that agreement should endure till the deed of partition should be executed. The husbands and wives entered upon the respective portions; and they, and persons claiming under them, were possessed thereof respectively, till ejectment was brought as after mentioned.

The husband of E. died in 1798, having devised the estates so held by him (not being part of the first devised lands) to E. and to his son, the rents to be equally divided between them during E.'s life; and after her death to the son in fee. The widow and son entered and took the rents accordingly. The son died in 1802, leaving T. T. M. his eldest son and heir at law. The widow died in 1818. From that time till 1832, T. T. M. received the rents of the premises held by E. and her son as above stated. In 1832 he brought ejectment for E.'s undivided third part of the original estate.

A case was stated for the opinion of the Court, with liberty to them to draw inferences as a jury might, the questions being whether the plaintiff was barred by the petition begun in 1758, or by the Statute of Limitations. The above facts were set forth. There was no evidence of due or recovery, or of any other proceeding to carry the agreement of 1758 into effect, except that, in

1830, the defendant, then holding the lands mentioned in the declaration, had written to T. T. M., the lessor of the plaintiff, requesting him to execute a deed, and go through some legal forms, to which T. T. M.'s wife also was required to be a party. The lands held by defendant were those appropriated by the agreement to D.'s husband, who had died intestate; and D., surviving him, had devised them to a party who had entered in 1801, and under whom defendant came in.

Held that, on the express statements in the case, no adverse possession appeared, and therefore none which, before stat. 3 & 4 W. 4, c. 27, could have barred the ejectment:

That, even if the Court could have presumed the suffering of a recovery from length of possession, that presumption was excluded here, by the express evidence of a written agreement; and the Court could at most only presume something done which would give effect to that instrument.

But that, as no more appeared to be contemplated by the agreement than a deed which would not have barred the estate tail, the plaintiff was entitled to judgment.

EJECTMENT for one undivided third part of certain lands and premises in the parish of Tywardreath in Cornwall. On the trial, before PATERSON, J., at the Cornwall summer assizes, 1882, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

The lessor of the plaintiff made title under an estate tail created by the will of one Thomas Constable, bearing date 20th February, 1718, "and by which he devised *the premises in question, called Pinnick, amongst others, to his nephew Nicholas Trevorian for life, [*1087 remainder to his first and other sons successively in tail; remainder to his daughters in tail; remainder to William Trevorian in tail; with the ultimate remainder to Thomas Constable the younger in fee."

Thomas Constable, the testator, died seised in fee on 20th April, 1719, without altering his said will; and his nephew Nicholas entered and took possession of the premises comprised in the will. The said William Trevorian died 4th May, 1741, and in the lifetime of the said Nicholas, leaving three daughters, Mary, Dorcas, and Elizabeth. The said Mary Trevorian, on 29th January, 1746, married William Millett: and, on 26th July, 1746, the said Nicholas Trevorian, the tenant for life, died unmarried and without issue; and the said William Millett and Mary his wife, the said Dorcas Trevorian, and the said Elizabeth Trevorian, entered and took possession of the said premises.

In Easter term, 21 Geo. 2, A. D. 1748, a common recovery was duly suffered by the said William Millett and Mary his wife, and the said Dorcas Trevorian, of their two undivided third parts of the said premises, which was declared to enure, as to one undivided third part, to the use of the said William Millett, for life, remainder to the said Mary his wife for life, remainder to the use of the heirs and assigns of the survivor of them: and, as to the other undivided third part, to the said Dorcas Trevorian in fee.

On 15th December, 1748, Dorcas Trevorian married John Millett: and on 28d March, 1759, Elizabeth Trevorian married Thomas Millett.

On 21st June in the same year (1759), the said *William Millett, John Millett, and Thomas Millett entered into an [*1088 agreement for the division of Tresaire and Pinnick, two of the estates

comprised in the will of Thomas Constable, and for the recovery of the latter of which this action was brought, and some other estates referred to in the agreement : which is as follows.

"Memorandum, taken this 21st of June, 1759, for drawing a deed of partition between William Millett, of the parish of Fowey," &c., "and John Millett, of the parish of Ludgvan," &c., "and Thomas Millett, of," &c., "of certain messuages, lands, and tenements hereafter mentioned, that is to say, all that tenement in the parish of Fowey aforesaid, called Tresaire, and all that tenement in the parish of Tywardreath, called Little Pinnick, and also all that part of a messuage or tenement in the parish of Golant, called South Legaun,^(a) and also all that messuage or tenement in the parish of Ludgvan aforesaid, called Collurian,^(a) and also another part of the said last-mentioned tenement called Collurian,^(a) held by lease from Mr. Prade, and also all that leasehold tenement in the parish of Ludgvan aforesaid, called Truthal, and also all that field^(a) of land in the parish of Marazion ; all which said tenements are divided or intended to be divided in such manner as is here set forth, that is to say: He the said William Millett do agree to take the aforesaid tenement called Tresaire for his share, in the sum or consideration of 430*l*. : likewise he the said John Millett do hereby consent and agree to take the aforesaid tenement called Little Pinnick in the sum or consideration of 430*l*. : likewise the tenement called South Legaun in the sum of 110*l*., *1039] for his share: He the said *Thomas Millett do likewise consent and agree to take the aforesaid tenement called Collurian in the sum of 260*l*. ; and the aforesaid part which is held by lease as aforesaid of the said tenement of Collurian in the sum of 80*l*. ; likewise the aforesaid tenement called Truthal in the sum of 80*l*. ; with the aforesaid field, which he takes in the sum of 70*l*. And it is hereby further agreed, by and between the said parties, that the money so arising from the estates by means of this division shall be shared, share and share alike, with all tin and tin bounds that shall now be, between the parties to those presents : and further it is hereby declared and agreed, and the true intent and meaning of these presents is, that every clause, sentence, and thing herein contained shall be and enure till the said deed or indenture of partition be drawn, signed, and sealed, and delivered by the said parties hereto."

This agreement was duly executed by the said William Millett, John Millett and Thomas Millett: and, in pursuance of it, they respectively entered and occupied the estates which they agreed to take under it; and such occupation has been continued by them, and those who claim under them, as to the freehold parts to this present time, and as to such parts as were leasehold until the terms expired. Thomas Millett died on 8th December, 1798, having first duly made and published his will, dated

(a) These premises came to the daughters of W. Trevorian as his co-heiresses, and not by devise. See p. 1042, post.

21st July, 1798, which, as far as it is material to the question before the Court, is as follows.

"I give, devise, and bequeath unto my son Thomas Millett, and his heirs and assigns for ever, from and immediately after my decease, all that one field of land in Marazion," &c., "commonly called or known by the name of Venton Hall;" and also, &c.: devises in the *same [*1040 form, to the same Thomas Millett, of testator's dwelling-house and garden in the parish of Ludgvan, called Gilly House; and his dwelling-house situate at White Cross in the same parish, then in the possession of one Joseph Nicholls: "And also I give, devise, and bequeath unto my said son Thomas Millett, after the death of my wife Elizabeth Millett, all that my estate in the said parish of Ludgvan, both freehold and leasehold, commonly called or known by the name of Collurian; the freehold part to him and to his heirs and assigns for ever, and the leasehold part for and during the term which shall be then to come and expire therein: but my will and meaning further is that, from and immediately after my death, and during the lifetime of my said wife Elizabeth M., the rent and profits of my estate of Collurian shall be equally divided, share and share alike, between my said wife and my said son Thomas Millett."

After the death of the said T. Millett the testator, the said Thomas Millett, who was the eldest son of the testator and the said Elizabeth, received the rents of the field in Marazion, and continued to receive the same up to the time of his death in 1802; and the said Elizabeth, and the said Thomas, the son, received the rents of Collurian in the shares bequeathed to them by the will of T. Millett, the father, up to the time of his (the son's) said death.

In the year 1802, Thomas Millett the son died, leaving Thomas Trevorian Millett, the lessor of the plaintiff, his eldest son and heir at law.

Elizabeth, the widow of Thomas the father, died on 15th May, 1818, having been in the receipt of the rents devised to her by his will (in which were comprised the *rents of the premises taken by the [*1041 said Thomas Millett under the partition made in 1759) up to the time of her death, leaving the said Thomas Trevorian Millett, the lessor of the plaintiff, her heir at law.

The following letter from the defendant to the said T. T. Millett, lessor of the plaintiff, who was then stationed in the preventive service at Foulness Island, formed part of the evidence at the trial.

"London, 22d January, 1830.—My dear sir: Since my return from Foulness Island, I have found that it is necessary that your wife should be a party to the deed I mentioned to you, as well as yourself: and it will save me much expense, and hasten the business considerably, if you and your wife will come to London for the purpose of going through some legal forms, which it appears must at all events be done. I will pay your expenses to London and back to Foulness, and whatever expenses

you may incur whilst in London. If you cannot come to London, I shall be obliged to take two lawyers with me to Foulness, which will occasion me considerable expense and trouble. As it is a great object to be expeditious in the business whilst the Judges are sitting in London, I shall be much obliged if you will let me know, by return of post, whether you can come to London with your wife or not. Only say yes or no; and I will arrange accordingly. Will you in the same letter tell me whether you have any other Christian name besides Thomas; and also tell me the Christian name of your wife? Believe me," &c., "J. N. R. Millett. "P. S. When I have your answer, I will write to you again," &c. "You need only be in London one day. Mr. Thomas Millett," &c.

*1042] The said John Millett, the husband of Dorcas, died in *1798, intestate, and the said Dorcas in 1799 (having first duly made and published her will, dated 22d March, 1798, whereby she devised the premises in question called Pinnick, among others, to her son William Millett in fee), leaving several sons, William, the devisee, who was a younger son, died in 1801, having first entered and taken possession of the said premises devised to him by his mother, and having first duly made and published his will, dated 17th November, 1800, whereby he devised all his lands, tenements, and hereditaments to his brother John Millett in fee. And John Millett, the grandfather of the defendant, having entered and taken possession of the premises devised to him by William, died in 1815, intestate, leaving John Nicholas Richards Millett, the defendant, his heir at law. And the possession of the said premises called Pinnick has continued in these persons respectively up to the time of the commencement of this action.

The tenements called Collurian and South Legaun, and the field in Marazion, were not included in the will of Thomas Constable, but descended upon the said three daughters, Mary, Dorcas, and Elizabeth, as the heir of the said William Trevorian.

Evidence was given at the trial by the defendant to show that, since the death of the father of the lessor of the plaintiff, he the lessor had received from the tenants of Collurian certain portions of the rent; that is to say, on 29th January, 1814, 1*l.*; on 22d December, 15*l.*; on 30th May, 3*l.* The rent was 100 guineas a year.

The Court were to be at liberty to draw any inference from the above facts which the jury might have drawn.

The questions for the opinion of the Court were: 1. Is the plaintiff barred by the partition begun in *1759? 2. Or by the Statute *1048] of Limitations? If he was barred, a nonsuit was to be entered: if not, the verdict for the plaintiff was to stand.

The case was argued last term.(a)

M. Smith, for the plaintiff. It does not appear by the case that any recovery was ever suffered as to the one third part which the lessor of

(a) May 31, 1848. Before Lord DENHAM, C. J., PATTERSON, WIGHTMAN, and KEIL, Jc.

the plaintiff claims as the heir in tail of Elizabeth Millett; or that the agreement for a partition was in any manner carried out. The only question, therefore, is, whether the title of the lessor of the plaintiff is barred by the law as it existed in 1832, when this cause was tried. Now the several third parts of Thomas Constable's estate have, it is true, been occupied by the persons whose representatives still hold them, ever since 1759; but that was, in its commencement, an occupation by mutual consent, and has never lost the character of a permissive holding. There is no room for presumption: the origin of the possession appears, namely, an agreement for partition, which was never carried into effect. The case is like that of a person let in under a contract for purchase, never completed; Doe dem. Milburn v. Edgar, 2 New Ca. 498. If a jury, in this case, were to presume a renewal of the agreement from time to time, they would not exceed the latitude allowed by Lord ALVANLEY in Roe dem. Pellatt v. Ferrars, 2 B. & P. 542: but no more is necessary here than to suppose that a state of things, once shown to exist, continued. In Doe dem. *Smith v. Pike, 8 B. & Ad. 738, where the lessor of the plaintiff claimed as heir in tail, and proved entry by his ancestor, but it appeared that, for thirty-five years before action brought, the defendant's family had occupied, the title of the lessor of the plaintiff accruing seven years before action brought, this Court refused to assume that the ancestor had conveyed by fine and recovery, or to require proof on the plaintiff's part that the defendant had come in by some conveyance which did not bar the plaintiff. Hall v. Doe dem. Surtees, 5 B. & Ald. 687, is a strong authority against presumption in such a case to the disadvantage of the party originally entitled. It is true that the doctrine of non-adverse possession is done away with, as the Court of Exchequer Chamber laid down in Nepean v. Doe dem. Knight, 2 M. & W. 894, 911, by stat. 3 & 4 W. 4, c. 27, s. 2; but it existed down to the time when the act came in force; counsel, in arguing that case (2 M. & W. 905), cited many authorities for the position (under the former law), "that where the original entry is lawful, the mere continuance of possession does not make it adverse." The arguments now urged apply à fortiori in the case of coparceners; for, before stat. 3 & 4 W. 4, c. 27, s. 12, came into force, possession by one tenant in common was possession by the other, unless there was an actual ouster; Fairclaim dem. Empson v. Shackleton, 5 Burr. 2604, Peaceable dem. Hornblower v. Read, 1 East, 568, 575. Indeed the clause just referred to implies that the law was so at the time of the act passing. No actual ouster can be surmised in the present case.

*Crowder, contra. First, independently of the Limitation Act, this is a case in which the length of possession and other circumstances justify every presumption that can be made in the defendant's favour. The agreement for partition in 1759, followed by many years of occupation consistent with it, warrants the supposition that it

was formally concluded, which might be done without deed; Litt. sect. 250, Co. Litt. 169 a. The coverture of any of the coparceners would not invalidate such a proceeding, even if the partition had been unequal; though she might have dissented from it on becoming discovert; Litt. sects. 256, 258, Co. Litt. 169 b, 171 a. Here no such dissent appears: and Elizabeth Millett, in whose right the lessor of the plaintiff claims, took, under her husband's will, part of the property apportioned by the agreement. To presume here a deed of partition, or even a fine or recovery, would not be going farther than authorities warrant. "There are many cases," Lord MANSFIELD said in *Eldridge v. Knott*, 1 Cowp. 214, 215, "not within the statute" (of Limitations), "where from a principle of quieting possession the Court has thought that a jury should presume anything to support a length of possession." Of this kind are *Lopez v. Andrew*, 3 Man. & R. 329, note (a) (to *Rowe v. Brenton*), *Doe dem. Goodwin v. Baxter*, 2 W. Bl. 1228, *Tenny dem. Whinnett v. Jones*, 10 Bing. 75. [Lord DENMAN, C. J. The case of the London tithes, *Macdougall v. Purrier*, 2 Dow. & Clark, 185, (a) is perhaps the strongest instance.] In *Doe dem. Fishar v. Prosser*, 1 Cowp. 217, undisturbed sole possession by a tenant in common for nearly forty *1046] years was held to be ground on which a jury might presume actual ouster of the co-tenant. In *Read v. Brookman*, 3 T. R. 151, BULLER, J., said it had been decided (*Hasselden v. Bradney*, 3 T. R. 159, (a) 4 G. 3, C. B.), that "a jury may find a recovery on presumption;" and this Court held that a deed, alleged to have been made many years ago, and "lost and destroyed by time and accident," was well pleaded without profert. The letter of 22d January, 1830, can have no weight; for there is nothing to connect it with any conveyance of which the non-completion would be material to this case. But, further, the facts here are not sufficient to take the case out of the Statute of Limitations which existed before stat. 3 & 4 W. 4, c. 27. *Doe dem. Fishar v. Prosser*, 1 Cowp. 217, shows that the prolonged occupation by tenants in common cannot have that effect, but, on the contrary, tends to prove an adverse entry, acquiesced in. Elizabeth Millett became discovert in 1798, and lived till 1818. In *Roe dem. Pellatt v. Ferrars*, 2 B. & P. 542, the occupation was deemed not adverse, because there was evidence of a continuing to hold, by agreement, on terms of an expired lease. Here no party could have held on the terms of the partition except by way of ouster as to the portion occupied. In *Doe dem. Milburn v. Edgar*, 2 New Ca. 498, the circumstances of the entry negatived the supposition of an adverse holding. In *Doe dem. Smith v. Pike*, 3 B. & Ad. 738, the Court merely refused to presume a possession adverse by reason only of its long continuance, as against a party whose ancestor had been entitled and entered. [PATTESON, J. In *Doe dem.*

(a) See this and other cases commented upon in *Doe dem. Woodhouse v. Powell*, 3 Q. R. 576

(b) In *Read v. Brookman*.

Fishar v. Prosser there was nothing to account for the forty years' possession.] *Here the agreement shows an intention to sever the property. [PATTESON, J. Ouster is one thing, partition [*1047 another. Which are we to presume here?] Either that the arrangement was carried out, or that it was rejected, and possession afterwards held adversely.

M. Smith, in reply. This agreement was not, properly, for a partition, but rather for an exchange. [PATTESON, J. The arrangement seems to have been that the coparceners should throw their shares, valued at certain amounts, into hotchpot, and then divide the product into three.] Even if a deed had been executed conformably to it, it would not have bound the issue in tail. [PATTESON, J. Stat. 32 H. 8, c. 32, enacts that joint tenants and tenants in common shall be compellable to make partition, though one or some of them may have life estates only; but that such partition shall not prejudice any person or persons, their heirs or successors, other than such as are parties to the partition, their executors or assigns.] The only supposable adverse possession in this case is for fourteen years; and its origin is accounted for. There is no precedent for presuming a fine or recovery of so recent a date as must be supposed here on the part of the defendant. No search for such a record has been proved, nor any reason given to suppose it lost. BULLER, J., in *Read v. Brookman*, 3 T. R. 159,(a) says that "a jury may find a recovery on presumption;" but the expression is quite general, and founded on an unpublished case. The Courts have at times gone a great length in presuming the existence of records and documents; but the doctrine on this subject has of late been restricted rather than extended. *It has been said that even an act of parliament [*1048 might be presumed; but that assertion was explained and qualified by Lord DENMAN, C. J., in delivering the judgment of this Court in *Regina v. The Chapter of Exeter*, 12 A & E. 512, 532.(b) Here the presumption of a fine or recovery is excluded. The letter of January 22d, 1830, is some evidence against it. And that presumption is the only one upon which a case of adverse possession can be grounded. [PATTESON, J. How can one tenant in common maintain ejectment against another without actual ouster?] The case, as submitted, does not raise that point. *Cour. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

This case was *tried* before the statute 3 & 4 W. 4, c. 27, was passed; therefore the old doctrine as to adverse possession will apply to it.

The case shows that, three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. The lessor of the plaintiff is the heir in tail of that third female.

All married: and their husbands in the year 1759 entered into an

(a) Citing *Hasselden v. Bradney*.

(b) See *Jewison v. Dyson*, 9 M & W. 540, 555.

agreement to make partition of the lands so held in coparcenary, as well as of other lands, part leasehold, part freehold, the leasehold having been devised by the same will which created the estates tail, and the freehold not being comprised in the will. The agreement provided for a deed of partition, but for nothing more. No deed was proved to have *1049] been *executed. The lands have been held according to that agreement for partition from the date of it till this action. Those in dispute have been held by the husband of one of the women who suffered a recovery, and those who have taken under him and her; and the lessor of the plaintiff claimed one third of them on the ground that the estate tail in that one third had not been destroyed: and he brought his action within twenty years after the death of the third woman, who did not suffer a recovery.

The possession was plainly under the agreement, and not adverse; but we are asked to presume that something has occurred to destroy the estate tail. That something must be either a recovery or a fine. Now, assuming that such a presumption might be made from the mere fact of long possession, if not accounted for by facts actually proved, we do not feel ourselves at liberty to make it when the possession is so accounted for. The most that we could do would be to presume that everything contemplated by the agreement for partition had been done: but, if we make that presumption, the lessor of the plaintiff will not be affected by it, because all that was contemplated was a deed, and that deed, if executed, would not have barred the estate tail.

We cannot, therefore, find any legal principle upon which we can say that this lessor of the plaintiff is not entitled to recover; and our judgment must be in his favour. Judgment for plaintiff.

*1050]

*MEMORANDUM.

In the vacation preceding this term Sir *David Dundas* resigned the office of Solicitor General, and was succeeded by *John Romilly* of Lincoln's Inn, Esquire, one of Her Majesty's counsel, who afterwards received the honour of knighthood.

END OF EASTER VACATION.

AN

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Plaintiff declared in case, setting forth that, after the statute passed, he was proceeding to take fish in his proper turn and station, and would have taken them, but defendant prevented him from so doing by unlawfully and wrongfully throwing a net; and the declaration described the proceeding so as to bring it within the statutory prohibition. On motion in arrest of judgment:

Held that the declaration showed no cause of action, the plaintiff stating no interference with any common law right, and the statute

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to the wives as co-heiresses, at certain specified values, and to share the money arising from the estates by means of that division, share and share alike: and it was declared that that agreement should endure till the deed of partition should be executed. The husbands and wives entered upon the respective portions; and they, and persons claiming under them, were possessed thereof respectively, till ejectment was brought as after mentioned.

The husband of E. died in 1798, having devised the estates so held by him (not being part of the first devised lands) to E. and to his son, the rents to be equally divided between them during E.'s life; and after her death to the son in fee. The widow and son entered and took the rents accordingly. The son died in 1802, leaving T. T. M. his eldest son and heir at law. The widow died in 1818. From that time till 1832, T. T. M. received the rents of the premises held by E. and her son as above stated. In 1832 he brought ejectment for E.'s undivided third part of the original estate.

A case was stated for the opinion of the Court, with liberty to them to draw inferences as a jury might, the questions being whether the plaintiff was barred by the petition begun in 1759, or by the Statute of Limitations. The above facts were set forth. There was no evidence of fine or recovery, or of any other proceeding to carry the agreement of 1759 into effect, except that, in 1830, the defendant, then holding the lands mentioned in the declaration, had written to T. T. M., the lessor of the plaintiff, requesting him to execute a deed, and go through some legal forms, to which T. T. M.'s wife also was required to be a party. The lands held by defendant were those appropriated by the agreement to D.'s husband, who had died intestate; and D., surviving him, had devised them to a party who had entered in 1801, and under whom defendant came in.

Held that, on the express statements in the case, no adverse possession appeared, and therefore none which, before stat. 3 & 4 W. 4, c. 27, could have barred the ejectment:

That, even if the Court could have presumed the suffering of a recovery from length of possession, that presumption was excluded here, by the express evidence of a written agreement; and the Court could at most only presume something done which would give effect to that instrument.

But that, as no more appeared to be contemplated by the agreement than a deed which would not have barred the estate tail, the plaintiff was entitled to judgment. *Doe dem. Millett v. Millett*, 1836.

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each party, and, if such persons disagreed,
by a third person to be named by them before
entering on the valuation; that each party
should appoint a referee by 31st May; and, if
either should neglect to appoint, the referee
of the other alone might make a final decision;
and, in case either party or his referee should
neglect to attend any reference after notice,
the party or the referee attending should
enter upon the reference ex parte and make
a final decision: the valuation to be made by
the 3d June. The declaration alleged that
on 31st May plaintiff appointed a referee, and
gave notice thereof to defendant a reasonable
time before 3d June, but no appointment, of
which plaintiff had notice, was made by de-
fendant; and plaintiff, a reasonable time be-
fore 3d June, gave defendant notice of the
intention of plaintiff's referee to proceed in
the valuation on 2d June; but defendant did
not attend, wherefore plaintiff's referee valued
at a sum named; which defendant, though
requested, had not paid. Pleas: that plaintiff
did not, within the time appointed, appoint
his said referee, in manner, &c.

It appeared at Nisi Prius that, under the
above agreement, plaintiff did nominate his

referee late on 31st May, and sent by that
night's post a notice thereof to defendant, who
received it on 1st June.

Held, that the issue on the plea must be
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as a prisoner from and out of a certain public
house to a police station, it is a good plea in
justification:

That defendant was lawfully possessed of a
house, being a tavern, &c.: that plaintiff came
into the house and made a disturbance, and
assaulted defendant and others there, and
afterwards stood and remained in the public
highway near and opposite to the door of the
said house and made a disturbance there, and
used menacing language to defendant and
his family, then in the said house and within
hearing; and that, by reason of such the
plaintiff's conduct, while he so stood, &c.,
many persons, while he so stood, &c., congre-
gated in the said highway near to and oppo-
site, &c., and made a noise, disturbance, and
riot in the said highway near, &c., in breach
of the peace and to the obstruction of defend-
ant's business and of the said highway: and
that, at the time of the removal after men-
tioned, plaintiff persisted in so standing, &c.,
making such noise, &c., and, by reason of his
so standing, &c., making, &c., was causing
many people to congregate in the said high-
way opposite and near to, &c., in breach of
the peace and to the obstruction of the said

highway, although, before such removal, and while he was so standing, &c., making, &c., he was requested by defendant to depart, &c., and to cease from making such noise, &c. Wherefore defendant, in order to restore and preserve the peace, and to get rid of the nuisance so occasioned by plaintiff, just before the times when, &c., gave plaintiff in charge to A. B., a constable, and required A. B. to remove plaintiff and deal with him according to law: and A. B., then being such constable, thereupon removed plaintiff and took him to the police station, and detained him there to be dealt with according to law and examined by a justice of peace, and for the purpose of so doing, and in so doing, committed the trespasses, &c.

To a declaration for assaulting and seising plaintiff, &c., defendant pleaded that he was lawfully possessed of a dwelling-house; that plaintiff was unlawfully therein, with force and arms, making a noise and disturbance in the said house without defendant's leave, and defendant thereupon requested him to depart, which he refused to do; whereupon defendant, in defence of the possession of his house, &c., molliter manus, &c., to remove, and did remove, plaintiff therefrom. Replication: That the said dwelling-house was a common inn, and plaintiff, at the times when, &c., was lawfully therein as a guest, consuming liquors there sold by defendant, which plaintiff had paid for, and at a reasonable time; wherefore plaintiff refused to depart when requested, as he lawfully, &c.: "and the defendant, of his own wrong, committed the trespasses in the said plea mentioned, in manner and form as in the declaration alleged."

Held, that the replication was bad, because it did not answer the allegation of plaintiff's misconduct.

Held also, by Lord DUNHAM, C. J., that the replication was double: and, by ERNE, J., that it was argumentative. *Webster v. Watts*, 311.

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To a declaration in trespass, charging that defendant assaulted plaintiff, imprisoned him, and kept him in prison, contrary to law and against his will, defendant pleaded that he committed the trespass by leave and license of plaintiff. On special demurrer,

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1. When liable to the country attorney's client for money had and received, and how.

Where a country attorney, who is employed in a cause, employs a London agent, there is not, in general, such privity between the client and the London agent as entitles the client to recover, for money had and received, against the agent, in respect of proceeds of the cause which the agent has received in the ordinary course of his business.

But, if it appear that such proceeds have been received by the agent without authority, either from the client or the country attorney, the Court will, if the agent be an attorney of the Court, compel him, upon application, to pay over the proceeds to the client. Though the country attorney be indebted to the London agent in a greater sum on other accounts. *Robbins v. Fennell*, 248.

2. Privity, 248. *Ante*, 1.

3. Receiving money without authority, 248. *Ante*, 1.

V. Proceeds of cause.

Liability of attorney or agent, 248. *Ante*, IV. 1.

VI. Remedies against: application to court.

To pay over money received without authority, 248. *Ante*, IV. 1.

VII. Summons for taxation: on attorney's application.

1. Statement of proceedings and allegation of dates in indictment for perjury in the matter of the summons.

An indictment for perjury alleged, in two counts, that, after the passing of the Attorney's Act, 6 & 7 Vict. c. 73, an attorney who had transacted certain law business for defendant, afterwards, *to wit*, on 7th August, 1844, delivered his bill of costs; that no application to have the bill taxed was made by the party chargeable within "one month" after delivery of the bill, nor was the bill referred for taxation within that period; that, after the expiration of "one month" from such delivery, *to wit*, on 25th April, 1845, the attorney obtained a Judge's summons requiring defendant to show cause why the bill should not be referred for taxation; that it became material in showing cause to ascertain whether defendant had retained the attorney; and that defendant falsely made affidavit in the matter of the summons, denying the retainer. Each count concluded, "and so the jurors aforesaid, upon their oath aforesaid, did say" that defendant had committed perjury.

The third and fourth counts were the same, except that they omitted to aver that no application to refer the bill had been made by the party chargeable.

The record then stated that, after joinder on a plea of Not guilty, a venire issued for a jury to try whether defendant "be guilty of the perjury and misdemeanor aforesaid," and that the jury found that he "is guilty of the perjury and misdemeanor aforesaid in manner and form as by the said indictment above against him is supposed;" and that a general judgment of imprisonment was pronounced on the indictment.

Held, on error to the Queen's Bench,

That, as all the counts referred to stat. 6 & 7 Vict. c. 73, the word "month," in the indictment, must be construed in the sense given to it by sect. 48, of "calendar month," and therefore the application, under sect. 37, to tax, did not appear to be premature.

That the third and fourth counts were good, because the Judge had jurisdiction, after the month, to issue the summons, though, if it had appeared, on showing cause, that a previous application within the month had been made by the party chargeable, the Judge might not have had jurisdiction to order taxation.

That the question of retainer appeared by the indictment to be material.

That, perjury having been well assigned in the part of each count preceding the words "and so the jurors did say," &c., those words might be rejected.

That "misdemeanor" was nomen collectivum, and therefore there was no uncertainty in the venire or verdict.

On error to the Exchequer Chamber: Judgment affirmed: Held by that Court:

That "month" in the indictment was to be construed in its ordinary sense of lunar month, but that, as the alleged dates were material, the videlicets were to be rejected, and the dates taken to be true, and, so, it sufficiently appeared that a calendar month had elapsed before the application to tax. And

Seem, also, that it was not necessary to allege that the calendar month had elapsed, as the Judge had general jurisdiction over the subject-matter, and his jurisdiction in the particular case was to be presumed. *Ryalls v. The Queen*, 781.

2. General jurisdiction of the Judge, 781. *Ante*, 1.

AUDIENCE.

Court of audience, 433, 656. *Bishop*, II.

AUTHORITY.

I. Generally.

1. Inference of, 127. *Corporation*, I. 1.

2. Acts and declarations within scope, 46. *Replevin*, VII.

II. Showing on face of proceedings.

What need not be set forth, 325. *Debtor*, II. 391. *Poor*, III. 1.

III. In particular instances.

1. From corporation aggregate, not under seal, 127. *Corporation*, I. 1.
2. To appear to amended bill, 1015. *Witness*, I. 2.

AVOIDANCE.

Of consideration, 702, 713. *Surrender*.

AVOWRY.

For penal rent, 949. *Distress*, II. 1.

AWARD.

Arbitration.

BAIL.

Taking insufficient, 46. *Replevin*, VII.

BAILMENT.

What consideration causes bailment not to be gratuitous.

Defendant, a carrier and wharfinger, received into his warehouse certain goods of the plaintiff, on the terms that they should be conveyed by defendant's barges to London, when the plaintiff should direct, at the usual freight, and that, in the mean time, they should be kept by defendant without charge for warehousing. Held, in an action for not keeping the goods safely, that defendant was not a gratuitous bailee. *White v. Humphery*, 43.

BANK.

I. Banking copartnership: evidence of being shareholder.

1. Stamp office return by person styling himself "cashier," 92. *Post*, III. 1.
2. Presumption of continuing to be shareholder, 92. *Post*, III. 1.

II. Transfer of shares.

Fraudulent, 92. *Post*, III. 1.

III. Banking copartnership: sci. fa. against former members.

1. What must be shown to obtain the writ.

To obtain a scire facias against former members of a banking copartnership, under stat. 7 G. 4, c. 46, ss. 12, 13, it is enough to show that executions, after scire facias, have been issued against several of the present partners, and nulla bona returned; that reasonable inquiry has been made as to the solvency of all; and that there is, on such inquiry, ground for believing that execution would not be effectual against any. On this last point, a prima facie case is sufficient.

To prove that a party against whom such application is made was a shareholder at a given time, it is enough to produce certified stamp office returns made, under sects. 4 and 5, by a person styling himself "cashier" of the company.

A party was named as a shareholder in one of such returns, but, in the next return exhibited to the Court, being of the same year, his name did not appear. On the plaintiff's part, affidavit was made of belief that the last-mentioned return was incorrect in omitting the name, and that the party continued a member beyond the time when it was made. Held sufficient ground for presuming that he did so continue, the party himself making affidavit in answer, and not stating any time when, or manner in which, he ceased to be a member, though he denied generally having been a member when the contracts now sued upon were made, and some of these were made before and some after the second return.

It is no answer to the application for a sci. fa., that a party, supposed solvent, who has ceased to be a member, and is not named in the application, was collusively and fraudulently, for the purpose of protecting him from liability, permitted to transfer his share. Or that another party not named in the application, but still a member, would, if execution went against him, be entitled to indemnity from solvent persons, though unable to pay the amount himself.

It is no answer, on behalf of an individual included in the application, that judgment is entered up in respect of several distinct causes of action, and that, for one of these, such party is not liable.

But in the case of such party it was agreed, on cause shown, and the Court ordered, that the writ should issue on an express undertaking by the plaintiff not to levy against him for more than was actually due. *Harvey v. Scott*, 92.

2. Ground of belief that execution would not be effectual, 92. *Antd*, 1.

3. Proof of being shareholder, by stamp office returns, 92. *Antd*, 1.

4. Presumption of continuing to be shareholder, where not distinctly denied, 92. *Antd*, 1.

5. Collusive transfer by other shareholders, 92. *Antd*, 1.

6. Nonliability to part of the causes of action, 92. *Antd*, 1.

7. Restriction to sum actually due as against the particular party, 92. *Antd*, 1.

8. Shareholder insolvent but entitled to equitable indemnity, 92. *Antd*, 1.

BANKRUPT.

I. Act of bankruptcy: procuring property to be taken in execution.

Bills of exchange.

If execution be taken out in the name of two parties jointly interested, as co-plaintiffs, and one knows of an act of bankruptcy already committed by the defendant, his knowledge is *prima facie* the knowledge of both; and the execution is not protected by stat. 2 & 3 Vict. c. 29, s. 1: even though the execution be in fact sued out by one party only, of whose knowledge there is no evidence.

Per COLMERIDG, J. *Quare*, whether the knowledge of one co-plaintiff would not affect the other, even if it were proved that he in fact was ignorant of the prior act of bankruptcy.

Under stat. 6 G. 4, c. 16, s. 3 (and see stat. 12 & 13 Vict. c. 106, s. 67), a party procuring bills of exchange, his property, to be taken in execution with intent to defeat creditors, after the passing of stat. 1 & 2 Vict. c. 110, committed an act of bankruptcy, though, at the time when that act of G. 4 passed, bills of exchange were not liable to be taken in execution. *Edwards v. Cooper*, 33.

II. Notice of act of bankruptcy.

Knowledge by one of several parties jointly interested, 33. *Antd*, I.

III. Protected transactions.

1. Knowledge of prior act of bankruptcy, 33. *Antd*, I.

2. Executions, 33. *Antd*, I.

IV. Creditor bringing debtor before court by affidavit.

1. Reasonable and probable cause for making an affidavit in the amount.

In an affidavit filed by a creditor, under stat. 5 & 6 Vict. c. 122, s. 11, to bring a debtor before the Court of Bankruptcy, *Quare*, whether it be sufficient, in every case, to state the items of demand on the creditor's side, or whether, if there be cross claims, he is bound to state also the amount for which he gives credit. *Semble*, per Lord DENHAM, C. J., and PATTERSON, J., that he is. *Semble*, per ERLE, J., contra.

But, if the creditor, in his affidavit, and in an account referred to by such affidavit and annexed to it, and served upon the debtor, states the total of his claim as 100*l.*, and the account specifies all the items of charge, which are summed up, and amount to 100*l.*, and credit is then given for a gross sum of 11*l.*, which, at the foot of the account is subtracted from the 100*l.*, and the balance, by mistake, set down at 99*l.*: Held that, if the creditor afterwards brings an action and recovers less than 99*l.*, the debtor is not therefore entitled

to his costs under stat. 5 & 6 Vict. c. 122, s. 19: For the affidavit must be taken as, substantially, alleging a claim of 89*l.* only. *Wilding v. Temperley*, 987.

2. Whether it is necessary to state the items on both sides the account, 987. *Antd*, I.

3. Effect of clerical error in computation, 987. *Antd*, I.

4. Debtors' claim for costs, 987. *Antd*, I.

BARON.

Court Baron. *Manor*.

BARON AND FEME.

I. Who may marry. *Marriage*.

II. Wife's freehold.

A husband takes a freehold interest, during the joint lives of himself and his wife, in land belonging to her in fee-simple; and such interest passes by the deed of the husband alone. *Robertson v. Norris*, 916.

III. Husband's deed.

What interests it may pass, 916. *Antd*, II.

BASTARD.

Within prohibited degrees, 173. *Marriage*, I. 1.

BIGAMY.

Marriage within prohibited degrees, 173. *Marriage*, I. 1.

BILL.

I. In legal proceedings.

Authority to appear to amended bill, 1015. *Witness*, I. 2.

II. Attorney's, 781. *Attorney*, VII. 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Consideration.

When not necessary; in *Ford v. Beech*, 854.

II. Alternatives.

What not an alternative designation of the payee, 19. *Post*, IV.

III. Term.

Includes the days of grace, 124. *Post*, XII. 5.

IV. Payee.

Promissory note payable to the order of the maker.

To assumpsit on a promissory note, stated to have been made by defendant, and endorsed by him to plaintiff, defendant pleaded, after setting out the alleged note, by which the defendant and four other persons jointly and severally promised to pay 750*l.* "to our and each of our order," that the endorsement was made by defendant alone. Replication: that the endorsement was by defendant jointly

with the other four. Issue thereon. Verdict for plaintiff. On motion in arrest of judgment, on the ground that such an instrument was uncertain as to the payee, and therefore not a note within stat. 3 & 4 Ann. c. 9, s. 1:

Held, that the note when endorsed became certain; and, the record showing that defendant had endorsed, enough appeared to warrant a judgment for plaintiff. *Abecolon v. Marks*, 19.

F. Collateral agreements.

1. Holder when not affected by, 143. *Post*, VIII. 1.

2. Suspending right of action as long as an annuity is paid; effect of, and how enforced.

In assumpsit by the payee of two promissory notes, for 200*l.*, and 140*l.*, against the maker, defendant pleaded in bar that, after the notes became due, it was mutually agreed, by plaintiff, defendant and A., that A. should pay to plaintiff 25*l.* per annum by quarterly payments, and, as long as A. so paid, the right of action on the notes should be suspended; and that A. had hitherto made the quarterly payments.

Held, by the Court of Exchequer Chamber, after verdict for defendant on a traverse of the payment by A., that the plea offered no answer, inasmuch as, if plaintiff were barred of his action on the notes for any period, his right of action would by law be extinguished altogether, which appeared not to be the intention of the agreement; and that therefore the agreement must be construed as giving defendant merely a right of action for breach thereof if plaintiff sued while the payments were continued. *Ford v. Beech*, 852.

3. When to be pleaded in an action on the bill, 852. *Ant*2, 2.

4. When to be made the subject of a cross action, 852. *Ant*2, 2.

VI. Accommodation.

1. Transfer after maturity, 143. *Post*, VIII. 1.

2. Who affected by collateral agreements, 143. *Post*, VIII. 1.

VII. Endorsement.

1. After due, to defeat a set-off, 406. *Post*, XII. 4.

2. How plaintiff must conduct his case on traverse of endorsement.

Where plaintiff, who sued as endorsee of a bill of exchange, relied, in the first instance, upon a *prima facie* case by evidence of the endorser's handwriting, evidence was given for the defence (on a plea traversing the endorsement) to show that plaintiff was too poor to have given value for the bill, and had disclaimed all knowledge of it: Held, that plaintiff could not give evidence in reply that he

was able to give value, and had actually discounted the bill, because such evidence was not in contradiction, but merely confirmatory of his *prima facie* case. *Jacobs v. Turland*, 421.

3. Effect on note drawn payable to the order of the maker, 19. *Ant*2, IV.

4. After due, equities, 143. *Post*, VIII. 1.

5. After due, pleading, 143. *Post*, VIII. 1.

VIII. Transfer after maturity.

1. Liability of acceptor.

To a declaration against acceptor on a bill of exchange drawn, payable to drawer's order, endorsed by him to B., and by B. to plaintiff, defendant pleaded that he accepted for the accommodation of the drawer and B., without consideration, and on the terms and condition that the bill should be negotiated for their accommodation only before the bill became due: and that the bill was endorsed to plaintiff, and plaintiff became holder after it became due.

Held a bad plea, on motion for judgment *non obstante veredicto*. *Carruthers v. Wat*, 143.

2. Equities, 143. *Ant*2, 1.

3. What must be excluded in plea, 143. *Ant*2, 1.

IX. Title.

1. Of endorser after he again becomes holder, 302. *Post*, XII. 3.

2. Of holder, for value of accommodation bill, 143. *Ant*2, VIII. 1.

X. Payment by.

1. Effect on the right of action for the original demand; in *Ford v. Beech*, 854, 873.

2. Pleading, 302. *Post*, XII. 3.

XI. Taking in execution.

When the procuring is an act of bankruptcy, 38. *Bankrupt*, I.

XII. Pleading.

1. Suspension by collateral agreement, 852. *Ant*2, V. 2.

2. Plea, endorsement after maturity by accommodation endorsee, without consideration, 143. *Ant*2, VIII. 1.

3. Traverse of allegation in plea that plaintiff's endorsee holds the bill.

Debt by drawer of a bill of exchange against acceptor. Plea, that, before action, plaintiff endorsed and delivered the bill to a third person, D., who then became, and thence afterwards, to wit, thence hitherto, remained, the holder thereof by virtue of such endorsement. Replication, that at the commencement of the action plaintiff was the holder of the bill, without this that D., from the time the bill was so endorsed and delivered to him "*hitherto*," remained the holder thereof, *modo et forma*.

Held, on special demurrer, that the replication was good; that it was not necessary to state how the bill, which plaintiff admitted that he had endorsed away, came back to him; and also that the traverse was not too large, as putting in issue immaterial matter by denying that D. was the holder from the time of endorsement "hitherto," because, if issue had been joined on the traverse, the defendant would have succeeded by proving that D. was holder at the time of the commencement of suit.

4. Replication de injuriâ to plea of fraudulent endorsement after due.

In assumption on a promissory note, by endorsee against maker, defendant pleaded that the payee before, at, and ever since the time of endorsement, was indebted to him in a sum equalling the money due on the note, and damages; and, while so indebted, and after maturity, in order to deprive defendant of his set-off, in fraud of defendant and in collusion with plaintiff, endorsed to plaintiff without consideration, in order to enable him to sue for the use and benefit of the payee: and that plaintiff commenced and maintains the action as agent for the payee, for his use and benefit, according to the fraud and collusion. And defendant offered to set off, to the payee and plaintiff, the damages sustained by the non-payment of the note, against the payee's debt to defendant. Replication: De injuriâ.

Special demurrer to the replication; held frivolous, inasmuch as fraud was averred in the plea; and it was immaterial to the goodness of the replication whether, without such averment, the plea disclosed a defence. *Tolhurst v. Noley*, 406.

5. Allegation of the term having elapsed, so as to include the days of grace.

Declaration, by endorsee of a bill of exchange against acceptor, stated that the drawer required defendant to pay "three months after the date thereof; which period had elapsed before the commencement of this suit;" that defendant accepted, and promised to pay the bill "according to the tenor and effect thereof," but "disregarded his promise," and did not pay.

Demurrer, assigning for cause, that the declaration did not show that the three days of grace had elapsed. A Judge at Chambers ordered the demurrer to be set aside as frivolous: and this Court refused a rule nisi to rescind the order. *Padwick v. Turner*, 124.

6. Setting aside demurrer as frivolous, 124. *Antd*, 5.

XIII. Evidence.

Under plea that plaintiff endorsed, and his endorsee from thence hitherto remained the holder, 302. *Antd*, XII 3.

BISHOP.

I. Election.

Letters missive and congé d'élire, 483. *Post*, II.

II. Confirmation.

Whether the metropolitan may hear objections.

H. having been, in pursuance of letters missive and congé d'élire, elected bishop of Hereford by the Dean and Chapter, letters patent issued to the Metropolitan, commanding him to confirm the election and consecrate H. The Metropolitan appointed commissioners for the purpose; and notice of the confirmation, to be performed at Bow Church in London, was published, with a citation of opposers. On the day named in the notice, the certificate of election was read, and opposers were publicly called to appear on pain of contumacy. Three clergymen, two of them holding benefices in the diocese of Hereford, then offered to appear, and claimed to put in in a libel or plea, stating objections to the confirmation, on the grounds that H. had published works repugnant to the doctrine of the Established Church, and had been therefore censured by the University of Oxford. The Commissioners refused to hear the objections, and confirmed the election in the form usual where no opposition is made.

A rule nisi having been obtained, on behalf of the objectors, for a mandamus to the Metropolitan or his Vicar General to hear the objections: Held:

Per Lord DENHAM, C. J., and ERLE, J., that the objections could not be heard, stat. 25 H. 8, c. 20, making it imperative on the Metropolitan to confirm without taking cognisance of such objections:

Per PATTESON, and COLERIDGE, J., that the objections ought to have been heard: or that, at least, there was ground for requiring a return.

No order was made.

But held that, if the objections ought to have been heard, the case was one in which a mandamus ought to have issued. *Regina v. Archbishop of Canterbury*, 483.

BOND.

I. Execution of.

Admitted by assignment, 46. *Replevin*, VII.

II. Condition.

To do an act without delay, 288. *Replevin*, II.

III. Replevin bond, 46. *Replevin*, VII.

BOROUGH.

Municipal. *Municipal Corporation*.

BREACH.

I. By delay in proceeding, 288. *Replevin*, II.

II. Of covenant to insure, 363. *Landlord and Tenant*, XI. 1.

BROKER.

I. Purchases effected through broker.

1. What change of circumstances does not authorise principal to repudiate.

Plaintiff employed defendants, brokers, to buy for him thirty shares, scrip, in a railway company for which an act of parliament had lately been obtained. Defendants purchased in their own names, the practice of brokers being such; and plaintiff paid them the price. The scrip was purchased "for account, 29th of August," but could not then be delivered, the scrip having in the mean time been called in by the directors to be registered, in order that shares might be issued. Before the shares came out, a call was made. These facts were known to the plaintiff; but he from time to time desired to have the scrip forwarded without further delay. The share certificates came out in December; and then the selling brokers tendered the shares to the defendants, with a demand of 150*l.* for the call. Plaintiff, on being applied to, refused to furnish the 150*l.*, denying his liability, and claiming the shares without such payment; and, on their being withheld, he repudiated the contract, and brought an action for money had and received.

Held, that the non-delivery of the scrip on the 29th August did not entitle him to recover his purchase money. *McEwen v. Woods*, 13.

2. What failure as to time does not authorise principal to repudiate, 13. *Antd*, I.

II. Payments by principal to.

When not money had and received to the use of the principal, 13. *Antd*, I. 1.

BUILDING ACT.

Accidental fire, 347. *Fire*, II.

BURGESS ROLL.

Municipal Corporation.

CANON LAW.

- I. How far the law of England, 483, 501, 534, 569, 586, 649. *Bishop*, II.

- II. Canons of, 175, 233. *Marriage*, I. 1.

CAPIAS.

Ad satisfaciendum.

On order of Court to pay money, 136. *Order*, I.

CARRIER.

Page 43. *Bailment*.

CASE.

Action on the case.

For injury from negligent fire, 347. *Fire*, II.

CAUSE.

Reasonable and probable.

For making affidavit of debt in a certain amount, 987. *Bankrupt*, IV. 1.

CERTAINTY.

- I. Of payee, 19. *Bills*, IV.

- II. In charging conspiracy to defraud, 245. *Conspiracy*, I. 1.

CERTIFICATE.

Presumptions in favour of, 66. *Poor*, IV. 1.

CHANCERY.

Costs of unsuccessful suit for specific performance, 292. *Costs*, V. 1.

CHARTER-PARTY.

- I. Alteration by endorsement, 1. *Count*, I.

- II. Distinct matters of complaint under altered charter-party, 1. *Count*, I.

CHATTELS.

Bills of exchange, 33. *Bankrupt*, I.

CHOSE IN ACTION.

When it vests in official assignee, 325. *Debtor*, II.

CHURCHWARDENS.

Signature of burgess list, 260. *Mandamus*, V. 2.

CIRCUITY.

- I. When an answer to action.

Liability of plaintiffs, as executors, to indemnify defendant against the sum to be recovered.

Assumpsit by executors: counts: 1, for work and labour of the testator, money paid by him, and on an account stated with him; with promise to him: 2, for work and labour and money paid by plaintiffs as executors, and on an account stated with them as executors; with promise to them as executors.

Plea. That testator, in consideration of defendant consenting to act on a provisional committee for a projected railway, agreed to indemnify him from any charges on account of the railway; and the work was done and money paid by testator, and account stated with him, in respect of the same, in surveying the line; and that the work was done and moneys paid by plaintiffs in and about surveying the line, and the account was stated with them in respect of the same work, &c.: that all the causes of action accrued after the promise to indemnify; and that defendant made the promises only in his character of member of the committee: that the railway was abandoned, and the work and payments

became of no value, and all sums recovered from defendant in respect thereof would be lost to defendant, and he would be damned to that extent. On special demurrer,

Held a good plea, for avoiding circuity of action, to both counts; since defendant, on the facts alleged, was entitled to recover, from testator in his life or from his representatives, as much as they would recover from him.

Another plea alleged that defendant in his lifetime caused defendant to enter into the promises by fraud. On special demurrer,

Held, a good plea, not only to the first count, but also to the second; since, if defendant was induced by testator's fraud to make the original contract with him, the same fraud procured the implied promise to the executors for the work they had done and money they had paid in pursuance of that contract. *Concep v. Levy*, 769.

11. Pleading.

Defendant's liability incurred on plaintiff's promise to indemnify, 769. *Antd*, I.

CITATION.

No state objections to confirmation of bishop elect, 483. *Bishop*, II.

CLAIM.

Statutable.

How enforced, 731. *Action*, I. 1.

CLERK.

Acts and declarations of, 46. *Replevin*, VII.

CO-DEFENDANT.

Costs incurred by, 39. *Damages*, II. 1.

COLLIER.

Absenting from service, 455. *Commitment*, I. 1.

COLLUSION.

When no answer, 92. *Bank*, III. 1.

COMMISSION.

I. To examine witnesses abroad, 997, 1006, 1015. *Witness*, I.

II. Of lunacy, 112. *Dures*.

COMMISSIONER.

Of insolvent debtors: his authority how pleaded, 325. *Debtor*, II.

COMMITMENT.

I. In the nature of a conviction.

1. When the only instrument contemplated.

In trespass for false imprisonment, it appeared that the plaintiff had been committed to prison by warrant of a justice under stat. 4 G. 4, c. 24, s. 3. The warrant alleged that the

plaintiff (a collier) had been guilty of divers misdemeanors, particularly that he had absented himself from the service of his masters before the term of his contract with them was completed, contrary to the form of the statute, &c.

Held, that no conviction was necessary under the statute; and that the warrant, whether it was an order or in the nature of a conviction, was the only instrument contemplated by the legislature, and the legality of the imprisonment depended upon the sufficiency of that instrument alone.

And that, whether the warrant was to be construed with less strictness, as being in the nature of an order, or with greater strictness, as being in the nature of a conviction, it was bad, as it did not bring the case within the statute by averring either that the contract was in writing, or else that the service had been entered upon. *Lindsay v. Leigh*, 455.

2. Whether in the nature of an order or of a conviction, 455. *Antd*, I.

3. Bad for not bringing the case within the statute, 455. *Antd*, I.

4. When defective, not supported by good conviction, 455. *Antd*, I.

II. In particular instances.

For absencing from service, 455. *Antd*, I. 1.

COMMON.

Tenant in common, 1036. *Adverse possession*.

COMPANY.

I. Public company: sale of interest.

Implied terms on sale of scrip, 13. *Broker*, I. 1.

II. Incorporated.

1. No presumption against power to appoint agent not under seal, 127. *Corporation*, I. 1.

2. Demise and notice to quit by, 127. *Corporation*, I. 1.

III. Banking copartnership, 92. *Bank*, III. 1.

COMPROMISE.

When impeachable on the ground of duress, 112. *Dures*.

COMPUTATION.

Clerical error, 987. *Bankrupt*, IV. 1.

CONDITION.

I. Implied.

On surrender in consideration or by acceptance of a new grant, 702, 713. *Surrender*, I.

II. Subsequent 147. *Mortgage*, I. 1.

III. Distinction between excluding a presumption and imposing a condition, 130. *Tender*.

IV. What tender is unconditional, 130. *Tender*.

V. Of bond, 288. *Replevin*, II.

CONDUCT.

Acts and declarations of person acting as officer, 46. *Replevin*, VII.

CONFINEMENT.

As lunatic, 112. *Duress*.

CONFIRMATION.

Of bishops, 483. *Bishop*, II.

CONGE D'ELIRE.

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CONSANGUINITY.

Prohibited degrees, 173. *Marriage*, I. 1.

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Of bishops, 483, 568, 622. *Bishop*, II.

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By counsel, 112. *Duress*.

CONSIDERATION.

I. For a contract, 358. *Contract*, III. 1.

II. Failure.

1. Partial when no answer to action of covenant, 973. *Covenant*, III.
2. Effect of showing avoidance of title without showing eviction, 973. *Covenant*, III.
3. By grant operating not according to the contract, 702, 713. *Surrender*, I.

CONSPIRACY.

I. Indictment: generality.

1. Indictment, charging that defendants "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" the prosecutor "of his goods and chattels:" Held good, on writ of error. *Sydeerff v. The Queen*, 245.
2. For conspiracy to defraud, charging larcenies as overt acts.

If an indictment, one count charged that L. carried on the trade of a dyer, and defendants were employed by him as his servants in the management of the trade, and it was their duty as such servants to employ the vats and dye of L. for his benefit, and for dyeing such woollen materials as might belong to themselves, or be intrusted to them by L. for those purposes, and on no other materials: that defendants unlawfully conspired, fraudulently and without L.'s consent, to employ the vats and dye in dyeing woollen materials not belonging to themselves, and not intrusted to them by L., and to obtain thereby profit

to themselves, and to deprive L. of the benefit and use of his vats and dye: that defendants, in pursuance of the conspiracy, wilfully and without L.'s consent, received woollen materials, and, wilfully and without his consent, and at his expense, with his dye and vats, dyed the same for their own profit. Another count charged that defendants, having engaged themselves and being employed by L., as his servants in managing the trade, conspired by artful means to obtain money by fraudulently and without L.'s consent using his dye and implements of trade in dyeing woollen, &c., materials for their own benefit, and to the injury of L.; that, in pursuance of the conspiracy, they, wilfully and without L.'s consent, received woollen materials, and, wilfully and without L.'s consent, at his expense, and with his dye and implements, dyed the materials for their own profit.

On motion in arrest of judgment: Held, that the indictment showed a misdemeanor; that the gist of the charge was the conspiracy; and that no felony appeared in which the misdemeanor could be merged.

The evidence at the trial was that L. permitted defendants to use his dye, &c., for their own materials, and such as he intrusted them with, but that they had made a profit by using them for other materials without his knowledge: there was no proof of a conspiracy besides the concurrence in the act. Held that, assuming the act itself to be a larceny, defendants might still be convicted of the conspiracy as a distinct offence. *Regina v. Button*, 929.

3. Overt acts imperfectly laid, 929, 949. *Antd*, 2.

II. Evidence.

Conspiracy proved only by acts themselves amounting to larceny, 929. *Antd*, I. 2.

III. In particular instances.

By servants of a dyer to defraud their master by using his materials in dyeing for other persons, 929. *Antd*, I. 2.

IV. Costs of joint defence, 39. *Damages*, II. 1.

CONSTRAINT.

Duress, 112. *Duress*.

CONSTRUCTION.

I. Of statutes.

1. In ordinary sense, 483, 566. *Bishop*, II.
2. In technical sense, 483, 567, 589, 648. *Bishop*, II.
3. According to usage, 483, 581, 627. *Bishop*, II.

II. Of pleadings.

In the sense that will make them valid, 1015. *Witness*, I. 2.

III. Of written instruments.

When for the judge and when for the jury.

An auctioneer was employed to sell land, under a written contract, that he should be paid one per cent. commission, but, if the estate were not sold within two months after the day of auction, only one half per cent.

Held that this, by itself, meant "two lunar months," unless there was admissible evidence that the parties meant "calendar months."

That the Judge might construe it to mean calendar months, if the context showed this meaning.

Or if this appeared to him, from the surrounding circumstances, at the time of making the contract.

That, if there were evidence that the words were used in a sense peculiar to the trade, business or place, the jury upon this might find such peculiar meaning.

And that a jury may, in some instances, find the meaning of technical words.

But that, here, the conduct or correspondence of the parties since the making of the contract was not evidence upon which, alone, a jury might find that the words denoted calendar months. *Simpson v. Margitson*, 23.

2. Oral evidence when admissible, 23. *Antd*, 1.
3. With reference to surrounding circumstances, 23. *Antd*, 1.
4. With reference to peculiar trade or place, 23. *Antd*, 1.
5. With reference to the meaning of technical words, 23. *Antd*, 1.
6. According to the interest and the apparent meaning, 147, 161. *Mortgage*, I. 1.
7. Repugnances reconciled by looking at the whole instrument, 466. *Devise*, I.
8. Whether words to be taken in statutory sense, 781. *Attorney*, VII. 1.
9. According to the apparent general intent to suspend without extinguishing, 862. *Bills*, V. 2.
10. Manifest errors of computation disregarded, 987. *Bankrupt*, IV. 1.

IV. Particular words and phrases.

1. "Accidentally," 347, 355. *Fire*, II.
2. "Accompanied by," 55. *Poor*, X. 1.
3. "According to the true intent and meaning of" an act, 325. *Debtor*, II.
4. "All," as all other, 466. *Devise*, I.
5. "As for rent," 949. *Distress*, II. 1.
6. "Estate and effects," 325. *Debtor*, II.
7. "Estate" in sense of land not built upon, 347, 355. *Fire*, II.
8. "Examination," 62 n. *Poor*, X. 3.
9. "Felony aforesaid," 799. *Indictment*, I. 1.
10. "Goods, money or chattels," 33. *Bankrupt*, I.

11. "Hereinbefore mentioned," 666. *Evidence*, XVIII. 3.
12. "Shall have the effect of judgments," 136. *Order*, I.
13. "Month," 781. *Attorney*, VII. 1; 23. *Antd*, III. 1.
14. "Mortgage," 147, 160. *Mortgage*, I. 1.
15. "Other," omitted in a second count, 799. *Indictment*, I. 1.
16. "Which period," 124. *Bills*, XII. 6.
17. "Reasonably obtain and possess without suit," 325. *Debtor*, II.
18. "The said Court," 379. *Sessions*, II. 1.
19. "Suspended," 852. *Bills*, V. 2.
20. "Watercourse," 688. *Lease*, III.

CONTINUANCE.

Of estate.

Pleading, 147. *Mortgage*, I. 1.

CONTRA FORMAM STATUTI.

When mere aggravation, 890. *Force*, I. 1.

CONTRA PACEM.

In a civil action, 890. *Force*, I. 1. 904. *Trespass*, I. 1.

CONTRACT.

I. Capacity: freedom of will.

Constraint by confinement and proceedings in lunacy, 112. *Durces*.

II. Capacity: lunacy, 112. *Durces*.

III. Consideration.

1. Executory: if the party shall do an act.

Declaration in assumpsit recited that, at the time of the making the agreement after mentioned defendant was possessed of a ship, and plaintiff was a master mariner having interest at N. in the West Indies for loading a vessel; and that, it having been proposed by plaintiff to defendant that defendant should give plaintiff the command for a voyage to the W. I. and back, it was agreed in writing, between plaintiff and defendant, that, "in consideration" of plaintiff having interest in N. for loading, &c., defendant would give plaintiff the command, "with the understanding that the plaintiff would use all possible exertion for the benefit of the ship;" "and that, for such services," defendant would pay plaintiff the sum, &c. The declaration then averred mutual promises to perform the agreement; that plaintiff had performed it; that defendant gave to plaintiff, and plaintiff set out in, the command of the vessel, and plaintiff performed the voyage out and discharged the outward cargo, provided a homeward cargo (adding some details in these respects), performed the voyage home, discharged the homeward cargo, and resigned the command,

and, during all the time, "used all possible exertions," &c.: breach, non-payment by defendant to plaintiff.

Held, on demurrer to a plea, a good declaration, as sufficiently showing that defendant undertook to pay plaintiff if he would take the command and use all possible exertion.

Plea: that the plaintiff did not use all possible exertions, in manner, &c. Held bad, on special demurrer, as not going to the whole consideration. *Mills v. Blackhall*, 358.

2. Distinction between inducement and consideration, 358, 365. *Antd*, I.

3. May not be traversed in part, 358. *Antd*, I.

4. Remedy for partial failure, 358, 365. *Antd*, I.

5. What sufficient to cause bailment not to be gratuitous, 43. *Bailment*.

6. Failure by grant passing an interest not according to the contract, 702, 713. *Surrender*, I.

7. Partial failure, 973. *Covenant*, III.

IV. Mutuality.

Not essential, 358, 364. *Antd*, III. 1.

V. Implied terms.

1. From the nature of the subject-matter, 13. *Broker*, I. 1.

2. On surrender of lease in consideration of a new one, 702. *Surrender*, I. 1.

3. On surrender of lease by acceptance of a new one, 713. *Surrender*, I. 2.

VI. Collateral.

1. Who bound by, 143. *Bills*, VIII. 1.

2. Mode of enforcing: plea or cross action, 852. *Bills*, V. 2.

VII. Acted on, but not perfectly carried out.

Presumptions, 1036. *Adverse possession*.

VIII. Liability.

When it arises, 358. *Antd*, III. 1.

IX. Incurred under promise of indemnity, 769.

Circuity, I.

X. Rescinding.

1. For defect of vendor's title, 368. *Landlord and Tenant*, XI. 1.

2. Not for changes in circumstances beyond the control of the parties and foreseen by them, 13. *Broker*, I. 1.

3. For misconduct of servant, wages not apportionable, 742. *Master and Servant*, I.

XI. Construction.

1. How far affected by extrinsic evidence, 23. *Construction*, III. 1.

2. Respective provinces of judge and jury, 23. *Construction*, III. 1.

3. According to the general intent, 852. *Bills*, V. 2.

XII. Pleading.

1. Declaration on mutual promises without defining exact duties, 358. *Antd*, III. 1.

2. Several counts on altered contract, 1. *Count*, I.

3. According to legal effect, including three days' grace, 124. *Bills*, XII. 5.

4. Under stat. 56 G. 3, c. 50, as affecting the rights of execution creditor under an assignment by the sheriff, 425. *Distress*, I. 1.

5. Circuity, 769. *Circuity*, I.

6. Fraud of testator as answer to count on implied promises to executor, 769. *Circuity*, I.

7. Assumption that a contract is pleaded according to its legal effect, 949. *Distress*, II. 1.

XIII. Enforcement by summary proceedings.

1. Commitment for absconding from service, 455. *Commitment*, I.

2. By distress, 949. *Distress*, II. 1.

XIV. Damages for breach.

Costs of unsuccessful suit for specific performance, when not so recoverable, 292. *Costs*, V. 1.

XV. Suit for specific performance.

Costs, 292. *Costs*, V. 1.

CONVICTION.

I. Commitment in the nature of, 455. *Commitment*, I. 1.

II. Supporting bad commitment by good conviction.

Not where commitment the only instrument contemplated, 455. *Commitment*, I. 1.

COPARCENER.

Adverse possession, 1036. *Adverse Possession*.

CO-PLAINTIFF.

Knowledge by, 33. *Bankrupt*, I. 1.

COPY.

Of examination, 55. *Poor*, X. 1.

COPYHOLD.

Customary court.

Failure of, for want of copyholders, 885. *Lease*, III.

CORPORATION.

I. Aggregate: acts by.

1. Demise by agent not appointed under seal.

On ejectment upon the demise of a corporation, it appeared, from defendant's admissions, that he had taken the land by permission of H., a servant of the corporation, and that F., another servant of the corporation, had given him notice to deliver up possession. No lease,

nor notice, nor appointment of F. or H. as agent under seal, was produced.

Held, that the jury were rightly directed to find for the plaintiff, if they thought H. and F. were authorised by the company to act.

A tenancy at will, commencing in 1824 and determined in 1831, before the coming into effect of stat. 3 & 4 W. 4, c. 27 (31st December, 1838), is no bar, under sects. 2, 7, to an ejectment commenced in 1847. *Doe dem. Birmingham Canal Company v. Bold*, 127.

2. Notice to quit by agent not appointed under seal, 127. *Antd*, 1.

II. Municipal. *Municipal Corporation*.

COSTS.

I. Erroneous award of.

1. When taken away by Court of Requests Act, 340. *Error*, I.

2. After an unauthorised adjournment, 379. *Sessions*, II. 1.

II. Taxation.

Respite of appeal for purpose, 379. *Sessions*, II. 1.

III. After refusal by judge to strike out counts.

Judge's endorsement, 1. *Count*, 1.

IV. Ca. sa. for.

On order of Court to pay, 136. *Order*, I.

V. Recovery in subsequent action.

1. Not plaintiff's costs of unsuccessful suit, against defendant, for specific performance.

M. agreed with F. to purchase land of him. On production of F.'s title, M. objected to it. F. insisted that it was good, and gave notice that he should sell at M.'s risk. M. then filed a bill against F. for a specific performance; and the question of title was referred by the Court of Chancery to a Master, who reported that F. had not a good title: whereupon the bill was dismissed without costs on either side; that being the practice of the Court of Chancery in such cases.

Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the Chancery suit. *Malden v. Fyson*, 292.

2. When too remote a damage, 292. *Antd*, I.

3. Joint costs of defence of plaintiff and another indicted together, 39. *Damages*, II. 1.

4. Costs of unproductive suits against sureties, 46. *Replevin*, VII.

VI. In particular proceedings.

Where creditor has brought debtor into Court of Bankruptcy by affidavit, 987. *Bankrupt*, IV. 1.

COUNCILS.

General.

Their authority, 483, 584. *Bishop*, II.

COUNSEL.

I. Appointed by lunatic, 112. *Duress*.

II. Consent by.

Not a conclusive negative of duress, 112. *Duress*.

COUNT.

I. Striking out.

Judge's endorsement on refusal.

In assumpsit by ship-owner against charterer for not loading the ship with a homeward cargo pursuant to charter-party, and detaining her over the running days thereby allowed, the first count, after setting out the charter-party, alleged that, after it was made, the parties signed an endorsement thereto, altering the terms of the delivery of the outward cargo and adding to the number of running days. A second count was framed on the charter-party without the endorsement.

A Judge, on summons to show cause why one count should not be struck out, endorsed that no order should be made, he being satisfied that it was intended bona fide to establish a distinct subject-matter of complaint in respect of each count.

On the plaintiff moving to strike out so much of the endorsement as stated that the Judge was satisfied, &c., upon affidavit that it had been suggested that two distinct subject-matters of complaint were to be established,

This court refused to interfere with the discretion of the Judge; but said that it was not to be considered as their opinion that the plaintiff might not declare on the contract, both as it originally stood and as altered, or that he would lose his costs if he succeeded on one only, but satisfied the Judge at Nisi Prius that he acted on a bona fide intention of establishing two subject-matters of complaint. *Hernod v. Wilkin*, 1.

II. What may be distinct subject-matters of complaint.

Breaches of altered charter-party both before and after alteration, 1. *Antd*, I.

III. Several counts in indictment for felony, 799. *Indictment*, I. 1.

COUNTY.

Justices.

Jurisdiction in boroughs, 758. *County Rate*.

COUNTY COURT.

Privilege of attorney to sue in superior courts, 921. *Attorney*, III.

COUNTY RATE.

Liability of boroughs.

Loss of exemption since stat. 5 & 6 W. 4, c. 76.

Before the passing of stat. 5 & 6 W. 4, c. 76,

the borough of Marlborough maintained a gaol and bridge within the borough, and paid other of its public expenses out of a fund in the nature of a borough fund, and was for that reason exempt from county rates under stat. 55 G. 3, c. 51.

After the passing of stat. 5 & 6 W. 4, c. 76, the borough (being one of those in schedule (B.)), did not obtain any grant of a separate court of quarter sessions. The justices for the borough continued to exercise jurisdiction therein, but not in exclusion of the county justices. The borough continued to maintain the bridge and gaol out of the before-mentioned fund: and the borough treasurer paid out of that fund (under orders made at sessions and assizes) the costs of prosecutions for offences committed within the borough.

Held, that the borough was now liable for a county rate assessed by the justices of the county in quarter sessions. *Regina v. Wills, Justices of*, 758.

COURT.

I. Inferior, what is.

Quarter sessions, in what sense not one, 799. *Indictment*, I. 1.

II. Continuing.

Quarter Sessions, 799. *Indictment*, I. 1.

III. Of error. *Error*, I.

IV. Court Baron. *Manor*.

V. Customary Court. *Copyhold*.

VI. Court Leet. *Manor*.

VII. Statutory restrictions of power to adjourn, 379. *Sessions*, II. 1.

COURT OF REQUESTS.

I. Mode of taking advantage.

By writ of error, 840. *Error*, I.

II. Brixton Court of Requests, 840. *Error*, I.

COVENANT.

I. Generally.

1. As to a thing not in esse, 444. *Post*, II. 1.

2. What are not usual and reasonable covenants, 688. *Lease*, III.

3. Construed according to the interest and the apparent meaning, 147, 161. *Mortgage*, I. 1.

4. Effect of, on an assignment of crops under execution, 426. *Distress*, I. 1.

II. What passes with the land.

1. When not so as to bind assigns not named: covenant to indemnify.

By indenture of lease, B., the lessee, for himself, his executors, administrators, and assigns, covenanted with the lessor to build four messuages on the land within a specified time from the date of the demise, and to pay

rent, &c.; and there was a clause for re-entry on non-performance of this or certain other covenants. By a subsequent indenture, B. demised to plaintiff (the houses not having been built), and covenanted with plaintiff that B., his heirs, executors, or administrators (not adding assigns), would pay the rent reserved by the former indenture, and perform, or effectually indemnify plaintiff of, from, and against, all the covenants therein contained on the lessee's or assignee's part to be performed. B. afterwards assigned to defendants.

Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the covenant to plaintiff was not such a covenant as would pass with reversion of the land and bind assignees not named; and therefore that the plaintiff could not recover against the defendants for not building the wall or indemnifying plaintiff against eviction for breach of the covenant to build. *Doughty v. Bowman*, 444.

2. Distinction between covenant to indemnify and covenant for quiet enjoyment, 444. *Antd*, I.

3. Cannot be split, 444. *Antd*, I.

4. When a covenant that runs with the land becomes a covenant in gross, 147. *Mortgage*, I. 1.

III. Dependent or independent.

Covenants for title by assignor, and for payment by assignee, on assignment to a trustee for both.

In an action of covenant, the deed was set forth on oyer, reciting a former deed between plaintiff and defendant, whereby plaintiff licensed defendant to use a patent, of which plaintiff appeared by the deed, as recited, to have obtained a regular grant. *Quære*, whether defendant was estopped by the latter deed from denying that the patent was valid as recited in the earlier deed, or only from denying that a deed alleging that fact was executed.

By the earlier deed, plaintiff licensed defendant to use his patent during a term, paying a stated royalty. By the deed declared upon, reciting the earlier deed and a subsequent contract of defendant with plaintiff for purchase of half the patent, subject to the former deed but with benefit to defendant of half the royalty, plaintiff, in pursuance of the contract, and in consideration of 2200*l.* to be paid to him by defendant, assigned the patent to a trustee, subject to the previous indenture, and in trust to apply the sums accruing from licenses to use the patent, and likewise to apply the royalties, for or under the direction of plaintiff and defendant respectively, in specified proportions, and to stand possessed, as to one moiety of the let-

ters patent, for plaintiff, as to the other, for defendant. Plaintiff covenanted that, for and notwithstanding anything done, &c., by him, the patent was valid, and should be held and enforced, by the trustee without lawful let, &c., by plaintiff, or any claiming under him, or by his act or default. And defendant covenanted with plaintiff to pay him the 2200*l.* by instalments. To a declaration in covenant for non-payment of such instalments, defendant pleaded, after oyer of the deed declared upon, that plaintiff was not the first inventor; by reason whereof the patent, before the supposed breach of covenant, was void. Replication, estoppel.

Held, on general demurrer, that the plea was bad. For,

1. No eviction was stated: and, in fact, the matter pleaded did not go to the whole consideration; since, even if the patent was void, the first executed deed would have bound the defendant, by estoppel, to payment of the royalty; and, by the latter deed, he became entitled to half the royalty.

2. That the covenant to pay the 2200*l.* was an independent covenant, and capable of being enforced whether the plaintiff's covenants were performed or not. *Outler v. Bower*, 973.

IV. Failure of consideration.

1. By patent being avoided, 973. *Ant2*, III.
2. When not before actual eviction, 973. *Ant2*, III.
3. Not where covenantor derives some benefit, 973. *Ant2*, III.

V. Several covenantees.

Who may sue alone, 147. *Mortgage*, I. 1.

VI. To insure against fire, 368. *Landlord and Tenant*, XI. 1.

VII. Pleading.

Estoppel by recited deed and the recitals therein, 973. *Ant2*, III.

COVERTURE.

Baron and Feme.

CREDITOR.

Proceeding by affidavit in bankruptcy Court, 937. *Bankrupt*, IV. 1.

CRIMINAL LAW.

Conspiracy. Indictment. Perjury.

CROSS ACTION.

The proper remedy on partial failure of consideration, 358. *Contract*, III. 1.

CROWN.

I. Its power in appointing bishops, 483. *Bishop*, II.

II. Presumption against.

Of dedication of highway, 877. *Highway*, I. 1.

III. Right of reply. *Regina v. Archbishop of Canterbury*, 560 n.

CUSTODY.

Proper, 884. *Evidence*, V. I.

CUSTOM.

Of the country.

Effect of on assignment of crops under execution, 425. *Distress*, I. 1.

CUSTOMARY COURT.

Copyhold.

DAMAGES.

I. Practice.

When not inquired into by Court of Error, 147. *Mortgage*, I. 1.

II. Costs.

1. Of joint defence by plaintiff and another. *Seemle*, that, if one of two parties indicted, having a defence common to both, retains an attorney to defend them, and pays him the whole costs of defence, and they are acquitted, such party, in an action for malicious prosecution, may demand the costs so paid as part of his damages.

Held that, at all events, he may so recover if, the costs of defence being divisible, it has been expressly left to the jury to deduct any part of such costs which they thought not fairly incurred by the plaintiff, and they have found for him as to the whole. *Rowlands v. Samuel*, 39.

2. Costs of a former suit between the parties, when too remote, 292. *Costs*, V. 1.

3. Costs of unproductive suits against sureties, 46. *Replevin*, VII.

DATE.

I. Material, laid under a writ of *sequestratio*, 147. *Mortgage*, I. 1.

II. Rejection of writs of *sequestratio* when dates material, 781. *Attorney*, VII. 1.

III. Meaning of word "month" in indictment on a statute which defines the meaning, 781. *Attorney*, VII. 1.

DEBT.

I. Action of.

1. On replevin bond, 288. *Replevin*, II.

2. By drawer against acceptor, after endorsement over and redelivery to drawer, 302. *Bills*, XII. 3.

II. On foreign judgment: pleading.

1. The proceedings in the foreign court pleaded, showing the judgment to be on an

amended bill, and the rejoinder traversing an allegation that the defendant had notice of that bill: what put in issue thereby, 1015. *Witness.*

2. What admitted by the traverse as to the meaning of the replication, 1015. *Witness.*
3. Replication how construed after verdict for plaintiff, 1015. *Witness.*

III. Amount.

Where there are cross demands, 987. *Bankrupt, IV. 1.*

DEBTOR.

I. Insolvent: formal proceedings.

What omissions do not exclude operation of act, 325. *Post, II.*

II. Insolvent, under stat. 5 & 6 Vict. c. 116: rights of action.

In whom vested, and when.

Under stat. 5 & 6 Vict. c. 116, s. 1, if there be debts due to an insolvent who has petitioned and not yet obtained the final order for protection, the right of action is in the official assignee, not the insolvent.

On special demurrer to a plea setting up the title of such official assignee in answer to an action by the insolvent:

Held, (The plea stating a petition filed by plaintiff with a schedule of his debts annexed), That such plea was not bad for want of a direct statement that debts were due from the plaintiff, or that the debt now sued for was included in his schedule.

Nor for omitting to aver directly that the notice to creditors was given after the passing of stat. 5 & 6 Vict. c. 116; it being alleged that the notice was "according to the true intent" of the statute.

Nor for omitting to show that a month had elapsed between the notice to creditors and the advertising of the time for hearing the petition. Per Lord DENMAN, C. J., if such time has not elapsed, the subsequent proceedings are not affected to the insolvent's prejudice.

Nor is the plea bad for omitting to show that the Commissioner who appointed the official assignee was himself appointed in a rotation established by order according to stat. 5 & 6 Vict. c. 116, s. 3, which order was approved of by the Lord Chancellor: or that the Commissioner, when he appointed the assignee, was acting in the matter of the particular petition. *Sayer v. Dufaur*, 325.

III. Insolvent, under stat. 5 & 6 Vict. c. 116: pleading.

1. What omissions do not vitiate a plea of the official assignee's title, 325. *Ante, II.*
2. Plea of final order: stating a vesting only in official assignee.

Plea, in assumpsit, that, after the accruing, &c., and before the commencement, &c., to wit, 16th June, 1843, defendant, not being a trader within the meaning, &c., and having resided twelve months in London, under and by virtue, and according to the directions, of stat. 5 & 6 Vict. c. 116, duly presented his petition for relief to the Court of Bankruptcy in London for protection from process, with a full and true schedule of his debts annexed, which schedule and petition were pursuant to and duly contained all the matters in that behalf mentioned in the statute; and the petition was, duly and according to the statute, filed of record in that Court; and such proceedings were thereupon there had, pursuant to the statute and in all respects conformably thereto, that afterwards, and before the commencement, &c., to wit, 28th August, 1843, according to the form of the statute, and pursuant thereto, a final order for protection and distribution was made by a commissioner duly authorised in that behalf: *that is to say*, such final order as aforesaid was made by F., one of the commissioners of the said Court, duly authorised in that behalf, for the protection of the person of defendant from all process, and for vesting the estate and effects of defendant in A., one of the official assignees of the Court of Bankruptcy: that the debt in the declaration arose before the filing the petition, and that the order was still in force.

On special demurrer:

Held a good plea, under sect. 10, though it did not state a vesting in a creditors' assignee as well as the official assignee, according to sect. 4, nor account for such assignee not being mentioned. And this, assuming that the part following *that is to say* could not be rejected as surplusage. *Lewis v. Harris*, 724.

IV. Insolvent: final order.

Silent as to vesting, 724. *Ante, III. 2.*

DECLARATION.

I. In pleading.

Striking out counts, 1. *Count, I.*

II. In particular cases.

1. For not paying price on valuation by plaintiff's referee, 7. *Arbitration, I.*
2. In case, for taking insufficient sureties, 46. *Replevin, VII.*
3. By assignee of mortgagee for rent reserved in lease by mortgagor and mortgagee, 147. *Mortgage, I. 1.*

III. In evidence.

Of person acting as officer, 46. *Replevin, VII.*

DEDICATION.

Of highway, 877. *Highway, I. 1.*

DEED.

I. Estoppel by.

Effect of recitals in recited deed, 973. *Covenant*, III.

II. Right to possession of.

When not put in issue, 112. *Duress*.

III. Presumption of.

Extent of the presumption, 1036. *Adverse Possession*.

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Of consanguinity and affinity, 173. *Marriage*, I. 1.

DE INJURIA.

Replication.

DELAY.

I. In prosecuting replevin, 288. *Replevin*, II.

II. Though time ordinarily allowed in practice has not been exceeded, 288. *Replevin*, II.

DEMISE.

Landlord and Tenant. Lease. Corporation.

DEMURRER.

I. Special.

To return to mandamus, 260. *Mandamus*, V. 2.

II. Frivolous.

1. To replication de injuria, 406. *Bills*, XII. 4.

2. Refusal of Court to interfere, 124. *Bills*, XII. 5.

DEPARTURE.

Rejoinder in the nature of a new assignment, 666. *Evidence*, XVIII. 3.

DEPOSIT.

Action for, on vendor failing to make out title, 368. *Landlord and Tenant*, XI. 1.

DEVISE.

I. Construction: repugnancy.

On looking at the whole will.

Testator, being seized of freehold and copyhold property, made his will, ordering, first, that his debts should be paid, and then devising to his wife, for her life, his dwelling-house, croft, and garden, part of the freehold, with remainder over. The will then proceeded: Also I give, &c., unto my said wife, her heirs and assigns for ever, all my real and personal estate whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to the uses of my will, and to have the same at my decease: but, if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same: And he appointed his wife and others executors.

Held, that the latter clause of the will did not revoke the former, but gave the wife, in addition to her life estate in the freehold house, croft, and garden, an estate in fee in the copyhold and the other freehold property, leaving untouched the remainder created by the first clause. *Doe dem. Snape v. Nevill*, 466.

II. Revocation.

By later clause, 466. *Ant*, I.

DISTRESS.

I. For rent.

1. Conflicting rights of landlord and execution creditor after assignment.

To a declaration in trover for pigs, wheat, straw, and other chattels, defendant pleaded that C. held a farm, as tenant to defendant, by demise, for a term; and justified the taking, within six calendar months after the expiration of the term, and while C. was in possession of the said farm, and the pigs, &c., were thereon, as a distress for rent arrear. Replication, as to wheat, straw, pigs, &c., parcel of the cattle, goods and chattels, that plaintiff had sued out a *f. fa.* on a judgment against C., under which writ the sheriff seized farming stock, goods, chattels, and growing crops of C., on the said farm, and, within a reasonable time afterwards, and before the distress, assigned to plaintiff, by agreement, the farming stock, goods, chattels, and the growing crops, cut and uncut, in satisfaction of the debt, &c., plaintiff thereby agreeing not to carry off, or dispose of for the purpose of being carried off, any straw threshed or unthreshed, except such wheat straw as C. had, or, in case the execution had not been levied, would have had, a right to dispose of, or any straw of crops growing, except as aforesaid, or any chaff, &c. (as in stat. 56 G. 3, c. 56, s. 1), being the produce of the farm, but that he should use and expend the same, except as before excepted, on the farm, according to the custom of the country: That the wheat and straw in the declaration mentioned were the produce of the said growing crops, having at the time when, &c., been covered from the soil, and continuing on the farm: That the pigs were kept and used by plaintiff on the farm for consuming the straw, under the statute and the agreement: and that, when defendant distrained, a reasonable time had not elapsed for the consumption of the straw.

Held, in Q. B., on special demurrer, a bad replication, because it did not negative the case (mentioned in sect. 3) of a covenant or written agreement being shown to exist at the time of the assignment, and therefore did not make it appear that the pigs, which were distrainable at common law, were protected

by the statute: And, also, because it did not appear that the wheat straw distrained was not such as, within the exception in the agreement, C. had a right to dispose of.

To the same plea, and as to the residue of the cattle, goods and chattels, plaintiff replied that, at the time of the distress, C. was in possession of only part of the farm, and the said residue of the cattle, goods and chattels was not on that part concluding with a verification.

Held, in Q. B., on special demurrer, that the replication was bad, and that the plaintiff ought to have traversed the averment that C. was in possession of the farm, or the averment that the goods, &c., were on the farm; or else to have been assigned.

Held by the Court of Exchequer Chamber, that the first part of the replication was bad in substance, because it did not expressly show either that no part of the straw or produce was such as the plaintiff might have removed at the time of the assignment, or, if any was so removable, that a reasonable time for removing it had not expired at the time of the distress. Judgment affirmed on this ground.

Held also, by the same Court, that the second part of the replication was bad, for that the plaintiff ought to have traversed the allegation, as pleaded, that the pigs, &c., were on a farm of which plaintiff had been tenant and was in possession. *Hutt v. Morrell*, 425.

2. Pleading under stat. 58 G. 3, c. 50, 425. *Antd*, 1.

II. For penalty under a demise.

1. Judgment for defendant in replevin on plea of Non tenuit.

Avowry: that plaintiff held and enjoyed the locus in quo as tenant to defendants, under a demise thereof to plaintiff theretofore made upon and subject to certain rents provisions, conditions, and stipulations, that is to say, that plaintiff should not, during the said tenancy, sell any hay, produced upon the premises during such tenancy, off the said premises, under the penalty of 2s. 6d. per yard of the hay sold as aforesaid, to be recovered by distress as for rent in arrear. Averment that plaintiff, during the tenancy, sold 800 yards of hay contrary to the said provisions and stipulations, by reason whereof a sum, &c., at the rate of 2s. 6d. per yard, became due, &c., and recoverable by distress. Plea in bar, Non tenuit. Verdict, that plaintiff did hold and enjoy in manner, &c.: and that the value of the distress was 99l., and the arrears were 54l. Judgment, under stat. 17 Car. 2, c. 7, that the defendants recover 54l. and costs.

On error to the Court of Queen's Bench, Admitted that, if the 2s. 6d. per yard was a penalty, judgment under stat. 17 Car. 2, c. 7, was erroneous.

Held by the Court of Queen's Bench: That a sum payable nomine pence for selling hay contrary to agreement between landlord and tenant, the amount being measured by the quantity of hay sold, might be a rent-service.

That the avowry, as here pleaded, might be taken as setting out the terms, and met the mere legal effect, of the instrument of demise.

That the instrument, as stated in the plea, either created a rent-service, or was a grant with license from the grantee to the reversioner to distrain as for a rent; and, *semble* that it had the latter effect. And

Held that, in either case, the defendants had rightly pleaded that they distrained as for a rent. Judgment affirmed.

On error to the Exchequer Chamber, Held by that Court: that the agreement must be considered as set out according to its legal operation.

That the legal operation was to create a penalty, recoverable by distress as for rent, but not a rent. That the avowry, therefore, was imperfectly pleaded. But,

Semble, that it was sufficient after verdict, as it might have appeared in evidence that the plaintiff had granted, under seal, a penalty to be levied by distress, or, if he held from the defendants themselves, that he had given them a license to enter and distrain in the case which had occurred.

But, Held that the judgment, given under stat. 17 Car. 2, c. 7, could not stand, the distress not being for a rent.

The Court reversed the judgment, and gave no other. For, on error brought either by plaintiff or by defendant below, the Court of Error, if the judgment be found erroneous, may give a right judgment for the plaintiff in error; but not against him. *Pollitt v. Forrest*, 949.

2. When it appears by the record to be a penalty and not a rent-service, 949. *Antd*, 1.

3. Under license to distrain. How granted, 949. *Antd*, 1.

DIVISIBILITY.

I. Of count in trespass qu. cl. fr., 890. *Forss*, I. 1.

II. Of issue raised on general plea of set-off, 842. *Set-off*, I. 1.

DUPLICITY.

I. Pleading.

II. In indictment for felony, 799. *Indictment*, I. 1.

DURESS.

By confinement and proceedings in lunacy.

Plaintiff being confined in a lunatic asylum, and an inquisition under a commission of lunacy being held upon her, and attended by her counsel, before any verdict was given an agreement was signed by her counsel and counsel attending for the promoters of the commission, that the plaintiff should be released from confinement, that certain arrangements should be made as to property which she claimed, that the title deeds relating thereto, which had been taken from her when she was confined, and now were in the hands of the promoters, should be given up and placed in the hands of H., and that the commission should be superseded. Accordingly, plaintiff was released; and the deeds handed over to H. Plaintiff then brought detinue against H. for the deeds. An interpleader rule was obtained, on the claim of the promoters, by which the proceedings were stayed, and a feigned issue brought by plaintiff against the promoters, to try whether plaintiff was entitled to the deeds notwithstanding the arrangement. Held:

1. That, on the trial of such issue, it was not necessary that plaintiff should prove her title to the deeds, the question being only whether the agreement prevented her from insisting on her title.

2. That it was rightly left to the jury, on evidence of the state of plaintiff's mind and health at the time of the agreement being made, to say whether the consent of her counsel was obtained by constraint and without her free will; and, the jury having so found, that plaintiff was entitled to the verdict: and that the legality of the restraint (assuming it to have been legal), and the consent of counsel, furnished no conclusive proof that the agreement was not void by duress. *Cumming v. Ince*, 112.

DUTY.

Stamp duties. *Stamp*.

DWELLING-HOUSE.

Pulling down whilst an intruder is inhabiting it, 904. *Trespass*, I. 1.

EASEMENT.

I. Thirty years' enjoyment as of right, 666. *Evidence*, XVIII. 3.

II. Particular easements.

To put dung and make manure on part of I. 1. q., 666. *Evidence*, XVIII. 3.

ECCLESIASTICAL LAW.

Canons.

Canons of 1603, 178, 223. *Marriage*, I. 1.

EJECTMENT.

Bar by statute.

Tenancy at will, when not, 127. *Corporation*, I. 1.

ELECTION.

Of bishops, 483. *Bishop*, II.

EMANCIPATION.

Presumption as to, 391. *Poor*, III. 1.

ENJOYMENT.

For thirty years, 666. *Evidence*, XVIII. 3.

ENTRY.

Forcible, 890. *Force*, I. 1. 904. *Trespass*, I. 1.

ERROR.

I. Coram nobis.

Effect of plea *In nullo est erratum*.

Plaintiff recovered a verdict, in this court, in debt, for a sum under 5*l.*, upon which judgment was entered for debt, damages, and costs. Defendant brought error coram nobis, and assigned for error that he resided in a district the residents in which, by statute (Brixton Court of Requests Act, 46 G. 3, c. lxxxviii. s. 14), were not liable to costs in any action for less than 5*l.* commenced in the courts of record at Westminster. The plaintiff below pleaded *In nullo est erratum*.

Held, that, on this record, the facts were admitted, and the cause assigned for error was sufficient. Judgment reversed. *Banks v. Newton*, 340.

II. Defects available on.

1. Duplicity of indictment, 799. *Indictment*, I. 1.

2. Uncertainty in jury process, 799. *Indictment*, I. 1.

3. Uncertainty in verdict, 799. *Indictment*, I. 1.

4. Uncertainty in judgment, 799. *Indictment*, I. 1.

5. Award of costs that are taken away by court of requests' act, 340. *Antd*, I.

III. What not inquired into.

Whether damages precisely correct, 147. *Mortgage*, I. 1.

IV. Judgment in error.

1. Reversal of judgment below, 949. *Distress*, II. 1.

2. Right judgment when not given in addition to reversal, 949. *Distress*, II. 1.

V. Venire de novo.

For what defects, 799. *Indictment*, I. 1.

ESTATE.

I. Generally.

What passes under the words "all the estate and effects," 325. *Debtor*, II.

II. Tail.

What agreement no bar though acted on, 1036. *Adverse Possession*.

III. At will, 122. *Landlord and Tenant*, III. 1, 137. *Corporation*, I. 1.

ESTOPPEL.

I. By deed.

By recited deed and the recitals therein, 973. *Covenant*, III.

II. Removal of, by eviction under title paramount, 713, 718. *Surrender*, I. 2.

III. By former judgment.

Special entry, 678. *Poor*, VI. 2.

IV. By conduct.

Mayor when estopped by acting on imperfect burgess list, 260. *Mandamus*, V. 2.

EVICTION.

I. By avoidance of patent, 973. *Covenant*, III.II. Covenant against, 444. *Covenant*, II. 1.

EVIDENCE.

I. When unnecessary.

Fact assumed by both sides, 678. *Poor*, VI. 2.

II. In reply.

Not admissible merely to confirm *prima facie* case, 421. *Bills*, VII. 2.

III. Primary.

Recitals directed by statute, when, 66. *Poor*, IV. 1.

IV. Documentary: what may be supplied by extrinsic evidence.

1. Place of executing, when, 66. *Poor*, IV. 1.
2. That person making a return holds the proper office, 92. *Bank*, III. 1.

V. Documentary: proper custody.

1. Attorney or agent of party.

On the trial of an ejectment, in order to account for an apparently adverse possession by defendant, the lessor of plaintiff proposed to prove that defendant had held under a lease granted by a party through whom lessor of plaintiff claimed, dated seventy years back, which had expired three years back. The lease was offered in evidence; and it appeared that it had been seen in the hands of the land agent of the lessor of the plaintiff, that the agent was in the assize town the day before the trial, but had left it and had not yet returned; and that his bag was out open in court, and the lease taken from it, by the plaintiff's attorney. The Judge having rejected the evidence, and nonsuited the plaintiff,

Held that the evidence ought to have been received: and a new trial was granted. *Doe dem. Earl of Shrewsbury v. Keeling*, 884.

2. Of expired lease, 884. *Ant2*, 1.3. Decision of judge at nisi prius, when reviewed, 884. *Ant2*, 1.

VI. Documentary: execution.

Execution of bond admitted by assigning it, 46. *Replevin*, VII.

VII. Documentary: records.

Production how procured, 877. *Reg. Gen.*

VIII. Documentary: legal proceedings.

1. *Fi. fa.*, to show fruitless proceedings, 46. *Replevin*, VII.

2. Award, when not evidence on an indictment against one of the parties.

F. was indicted for perjury committed by deposing, in an affidavit in a cause wherein he, F., was plaintiff, and E. defendant, that E. owed him 50*l*. Held that, in support of this indictment, evidence was not admissible that the cause of F. against E. was, after the making of the affidavit, referred by consent, and an award made that E. owed nothing to F. *Regina v. Fontaine Moreau*, 1023.

IX. Documentary: return to commission to examine witnesses.

Return how proved, 1015. *Witness*, I. 2.

X. Documentary: recitals in compliance with statute.

Recital of order for binding parish apprentices, 66. *Poor*, IV. 1.

XI. Documentary: entries by deceased officer.

When proved, or assumed by both parties, to be in the usual course of duty, 678. *Poor*, VI. 2.

XII. Parol.

In construing written instruments, 23. *Construction*, III. 1.

XIII. Inferential.

Whole sequence of facts inferred from proof of some of them. Delivery under order of removal, 678. *Poor*, VI. 2.

XIV. Conduct.

1. Acting as officer in the particular case, 46. *Replevin*, VII.2. Deceased officer acting as if in the performance of the act to be proved, 678. *Poor*, VI. 2.

XV. Admission by conduct.

By assigning replevin bond, 46. *Replevin*, VII.

XVI. Declarations: within scope of duty.

1. Of replevin clerk, 46. *Replevin*, VII.2. By person employed to remove pauper, 678. *Poor*, VI. 2.XVII. *Res inter alios*.

1. Proceedings in other actions when admissible, 46. *Replevin*, VII.

2. Award between parties when not evidence on indictment preferred by one against the other, 1028. *Ante*, VIII. 2.

XVIII. What admissible under the general issue, and other traverses.

1. Non assumpsit: plaintiff's title.

In indebitatus assumpsit for goods sold and delivered, where there has been a sale in point of fact, the defendant cannot show under non assumpsit, that the plaintiff had no title to the goods at the time of the sale. *Walker v. Mellor*, 478.

2. See also, 476. *Assault*, II. 3.

2. Traverse of thirty years' enjoyment of right.

Under stat. 2 & 3 W. 4, c. 71, if to a declaration in trespass the defendant plead enjoyment as of right for thirty years next before the commencement of the action, and the plaintiff simply traverse such enjoyment, he cannot support the traverse by proof that, though there was such enjoyment, yet, for a period of time, without including which there would not be a thirty years' enjoyment, there was a tenant for life of the locus in quo. *Pye v. Mumford*, 666.

XIX. Of particular facts.

1. Of delay in prosecuting replevin, 288. *Replevin*, II.
2. Of execution of replevin bond, 46. *Replevin*, VII.
3. Of being member of banking copartnership, 92. *Bank*, III. 1.
4. Of insolvency, 92. *Bank*, III. 1.
5. Of delivery under order of removal, 678. *Poor*, VI. 2.

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Of witnesses abroad, 997, 1006, 1015. *Witness*, I.

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- I. In lease, for benefit of a stranger, effect of, 688. *Lease*, III.
- II. Of a watercourse, 688. *Lease*, III.
- III. Pleading bad for not excluding, 425. *Distress*, I. 1.

EXECUTION.

- I. On order of Court to pay money, after year and day, 136. *Order*, I.
- II. Under sci. fa.
Limiting to sum due as against the party, 92. *Bank*, III. 1.
- III. Where bankruptcy supervenes.
1. Intent to defeat creditors, 33. *Bankrupt*, I. 1.
2. What not protected, 33. *Bankrupt*, I. 1.

IV. Proceeds of.

Liability of attorney's agent, 248. *Attorney*, IV. 1.

V. Ineffectual, against existing shareholders in banking copartnership, 92. *Bank*, III. 1

EXECUTORS AND ADMINISTRATORS.

I. Right of action.

1. Circuity of action caused by testator's promise to indemnify defendant, 769. *Circuity*, I.
2. Contract induced by testator's fraud, when an answer to count on implied promise to executors, 769. *Circuity*, I.

II. Set-off.

To assumpsit for money received to the use of plaintiff as administrator, and on an account stated with him as administrator, with promises to him as administrator, defendant cannot plead a set-off for money due from the intestate in his lifetime. *Schofield v. Corbett*, 779.

FALSE IMPRISONMENT.

Imprisonment.

FEIGNED ISSUE.

To try whether party entitled to deeds.
Title when not put in issue, 112. *Durress*.

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- I. Whether nomen collectivum, 799. *Indictment*, I. 1.
- II. Effect of general verdict of guilty and judgment on several counts, 799. *Indictment*, I. 1.
- III. Venire de novo in, 799. *Indictment*, I. 2.
- IV. When conspiracy does not merge in, 929. *Conspiracy*, I. 2.

FEME COVERT.

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FIRE.

I. At common law.

1. Liability for consequence of negligent fire, 347. *Post*, II.
2. Breach of covenant to insure, 368. *Landlord and Tenant*, XI. 1.

II. Under Building Act.

To what fires the provisions apply.

Sect. 86 of the Building Act, 14 G. 3, c. 78, which enacts that no action shall be maintained against any person in whose house, or on whose estate, any fire shall "accidentally begin," is not confined in its operation to those districts to which the limited clauses of the act are restricted.

It does not apply where a fire is produced by negligence: and, in that case, by the common law, an action lies against the party by whose negligence or that of his servants, a fire arises on his premises and damages the property of another.

It does not apply where the fire is lighted intentionally, and mischief happens to result. *Filliter v. Phippard*, 347.

FISHERY.

Statutable.

Remedy for breach of regulations, 731. *Action*, I. 1.

FORCE.

I. Forceful entry.

1. Trespass for: what allegations are mere aggravation.

Declaration stated that defendants *with force and arms, and with a strong hand and against the form of the statute in such case, &c.*, broke and entered plaintiff's dwelling-house then in his actual occupation, made a noise and disturbance therein, and stayed therein making such disturbance, &c., and in a forcible manner and with a strong hand broke open the doors, broke the locks, &c., and with force and arms, &c., assaulted plaintiff, and in a forcible manner and with a strong hand expelled him, &c.

Plea: Not Guilty: and, as to the breaking and entering, &c., making a noise, &c., and staying, &c., and breaking open the doors, &c., "as in the declaration mentioned," that the dwelling-house, &c., was the dwelling-house, soil, and freehold of one defendant, wherefore he in his own right, and the others as his servants, &c., at the time when, &c., broke and entered, &c., and committed the supposed trespasses.

On special demurrer to the last plea: Held (Assuming the averments in the count to be indivisible, and that all must be answered by the plea): That the plea answered every material part of the declaration, the averments "with force and arms," "with a strong hand," and "against the form of the statute," being, on these pleadings, matter of aggravation only.

Quare, whether an entry by force and in breach of the peace, when those circumstances are material, can be justified by showing that the defendant was entitled to the premises, and the plaintiff an intruder. *Davison v. Wilson*, 890.

2. Re-entry upon an intruder, 890. *Ante*, I. 904. *Trespass*, I. 1.

II. Pleading.

Difference between *vi et armis* and *minus forti*, 890. *Ante*, I. 1.

FOREIGN JUDGMENT.

I. Debt on judgment of Supreme Court of Newfoundland, 1015. *Witness*, I. 2.

II. Defence that the proceedings were *ex parte*, 1015. *Witness*, I. 2.

FORFEITURE.

Liability to, for breach of covenant to insure, 368. *Landlord and Tenant*, XI. 1.

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Effect of established forms varying from the fact, 483, 570, 609, 628. *Bills*, II.

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I. Generally.

1. In obtaining surrender by misrepresenting power to grant a new lease, 702, 713. *Surrender*, I.

2. Of testator, when an answer to count on implied promises to executors, 769. *Credibility*, I.

3. Of third person, when no answer, 92. *Bank*, III. 1.

II. Pleading.

De injuria may be replied to plea substantially alleging fraud, 406. *Bills*, XII. 4.

FREEHOLDER.

Of manor, 688. *Lease*, III.

GENERAL ISSUE.

Plea of. *Plea*, *Evidence*.

GENERALITY.

In indictment for conspiracy, 245. *Conspiracy*, I. 1.

GOODS SOLD AND DELIVERED.

Evidence under non assumpsit, 478. *Evidence*, XVIII. 1.

GRACE.

Days of, 124. *Bills*, XII. 5.

GRANT.

I. Implied conditions as to its validity, 702, 713. *Surrender*, I.

II. Passing an interest not according to the contract, 702, 713. *Surrender*, I.

HEARING.

When equivalent to no hearing, 483, 577. *Bills*, II.

HIGHWAY.

I. Dedication.

1. Presumption of against the Crown.

On the trial of an indictment, for non-repair of a road, against a tithing, bound by

custom to repair all public roads therein, it appeared that the road had formed part of the waste of a manor, and had been set out as a private road by award of commissioners under a private enclosure act, and had been used by the public generally ever since it had been so set out. A portion of the waste had been allotted to the lord (as the act directed) in respect of his interest in the soil.

After verdict for the Crown, it was argued, for the defendants, on motion to enter a verdict for them, that the soil of the road had been taken from the lord, and transferred to no other person, and therefore there was no owner, or none against whom a dedication to the public could be presumed; and that, if the Crown were the owner, the jury should have been directed that stronger evidence was necessary to raise a presumption of dedication than if the owner had been a private person.

Held, that dedication might be presumed against the Crown from long acquiescence in public user; and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that a dedication to the public was intended. *Regina v. East Mark*, 877.

2. Of road set out under enclosure act as a private road, 877. *Antd*, 1.

II. Ownership of waste, 877. *Antd*, I. 1.

HIRING.

General, 742. *Master and Servant*, I.

HUSBAND AND WIFE.

Baron and Feme.

ILLEGITIMATE.

Bastard.

IMPLICATION.

I. Implied condition on surrender in consideration of a new grant, 702, 718. *Surrender*, I.

II. Implied surrender, 702, 718. *Surrender*, I.

IMPRISONMENT.

I. Assault and imprisonment, 811. *Assault*, II. 1.

II. Duress per prisonam, 112. *Duress*.

III. Pleading.

Whether plea of leave and license amounts to the general issue, 473. *Assault*, II. 3.

INCEST.

Page 173. *Marriage*, I. 1.

INCLOSURE.

Private roads.

Conversion by user into public roads, 877. *Highway*, I. 1.

INCONSISTENCY.

Cured after verdict by rejection of surplusage, 913. *Indictment*, I. 1.

INDEMNITY.

I. Covenant for, does not run with land, 444. *Covenant*, II. 1.

II. Promise to indemnify.

Circuity occasioned by, 769. *Circuity*, I.

INDENTURE.

Parish, 66, 78 n., 80. *Poor*, IV.

INDICTMENT.

I. Several counts.

1. For felony: effect of general verdict of guilty of the felony, and judgment in the same form.

Indictment, at Quarter Sessions, charged prisoners in the 1st count with stealing in the dwelling-house of A. the moneys and goods of A. above the value of 5l.: in the 2d count, with simple larceny of moneys and goods (not "other" moneys, &c.) of the said A., describing them precisely as in the 1st count, and not using the word "afterwards." Plea: Not guilty of the premises. Jury probes to try whether the prisoners are guilty of the felony aforesaid. Verdict: that the prisoners are guilty of the felony aforesaid, as by the indictment aforesaid supposed. Judgment, that the prisoners respectively be transported for ten years.

Held, on error in Q. B., that an indictment for felony containing several counts is bad in arrest of judgment, and on error, for duplicity, if it necessarily appear that two or more of the counts are for the same offence: but that this did not necessarily appear on the present indictment.

That the word "felony" was not *nomen collectivum*, meaning felony generally, but pointed to one particular charge of felony.

That the verdict was bad for uncertainty in not specifying the offence of which it found the prisoners guilty. And,

That the judgment was erroneous, the Court not being at liberty to apply it to the first count only.

Verdict and judgment set aside: and adjudged that the Sessions should award a *reple de novo*.

On error in the Exchequer Chamber:

Held that, whether or not the word "felony"

was to be taken as nomen collectivum in the judgment at Sessions, it could mean in the jury process one offence only: and therefore the process was here misawarded, and the judgment could not be sustained.

The Court of Quarter Sessions, whether held before a recorder or ordinary justices, is not an inferior court within the meaning of the rule which prevents issuing a venire de novo to inferior courts; and it is, in each case, a continuing court from session to session.

Therefore, when such court gives judgment against defendant on a verdict upon jury process which has been misawarded, a court of error may order it to award a venire de novo.

Quare, whether on a defective verdict in felony, a venire de novo may be awarded. But, if it may, this may be done by a court of error after judgment given in the Court below on such verdict.

Judgment of Queen's Bench affirmed. *Compbell v. The Queen*, 799.

2. Misdemeanor nomen collectivum, 781. *Attorney*, VII 1.

II. Duplicity.

Bad in arrest of judgment, and on error, 799. *Antd*, I 1.

III. Inconsistency.

Rejected as surplusage, 913. *Post*, V.

IV. Generality.

In charging conspiracy to defraud, 245. *Conspiracy*, I 1.

V. Names of parties.

Inconsistency cured by rejecting surplusage.

A count in an indictment charged that the defendant made an assault upon one "Henry B.," "and him the said William B., did beat," &c., "and other wrongs to the said William B." did, to the "damage of the said William B."

On motion in arrest of judgment:

Held, sufficient. *Regina v. Creepin*, 913.

VI. Allegations of time.

1. Rejection of videlicets when dates material, 781. *Attorney*, VII 1.

2. Meaning given to the word "month," 781. *Attorney*, VII 1.

VII. Jurisdiction.

1. General, when sufficiently shown, 781. *Attorney*, VII 1.

2. In particular case, when presumed, 781. *Attorney*, VII 1.

VIII. Conclusion.

What may be rejected, 781. *Attorney*, VII 1.

IX. Demurrer to.

To what extent unnecessary, 799. *Antd*, I 1.

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III. Tenancy at will.

1. What creates a tenancy at will.

Proviso in a deed: A. agrees "to become tenant" to C. and D. of the premises, &c., "at their will and pleasure, at and after the rate of 25*l.* 4*s.* per annum, payable quarterly." A. remained in possession under this agreement for two years, and paid a year's rent; after which the lessors distrained for four quarters' rent.

Held that A. was tenant at will, and not from year to year. *Dec dem. Banton v. Cox*, 122.

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V. Commencement of holding.

Where sub-lessee holds on after expiration of lease.

Tenant for term underleased. The sub-lessee held over, and paid rent. The original lease commenced at Christmas and expired at Midsummer. Held that the tenancy from year to year commenced at Midsummer, not Christmas, and notice to quit must be given accordingly. *Dec dem. Buddle v. Lines*, 402.

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2. To pay rent: when it becomes a covenant in gross, 147. *Mortgage*, I. 1.
3. Usual and reasonable, 688. *Lease*, III.
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XI. Forfeiture by breach of covenant.

1. Insurance for too small a sum, for too short a time, and in too many names.

Under a lease with a proviso of forfeiture if the covenants be broken, forfeiture is incurred:

1. If the lessee covenants to insure the buildings from time to time and at all times, and leaves a part uninsured for two months after execution of the lease. Nor is it any answer that the greater part of the premises were already insured at the requisite amount (1400*l.*) by policy expiring at the end of the two months, and that on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount (1700*l.*):

2. If the covenant be to insure against fire in the names of the lessor, A., B., and C. and the lessee adds his own. Nor is it any answer that, by stat. 14 G. 3, c. 78, s. 83, any person interested in the buildings may require that the insurance company shall cause the insurance money to be laid out in rebuilding. Especially where the covenant contains an express provision that the insurance money shall be so laid out, and that the lessee shall supply what is deficient.

If a lessee, having incurred these forfeitures (though the lessor has taken no step to enforce them), contracts to sell his term, the purchaser, on becoming acquainted with them, may refuse to complete his contract, and may reclaim his deposit. *Pensill v. Harborne*, 368.

2. What excuses insufficient, 368. *Ante*, I.

XII. Surrender. *Surrender*.

XIII. Notice to quit.

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1. Distress for rent. *Distress*.
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In pleading. *Pleading*, V.

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Under a power.

I. Premises annually leased.

1. Joint demise of tenements previously let separately, 688. *Post*, III.
2. Demise including a watercourse previously excepted, 688. *Post*, III.

II. Reservations for the benefit of the lessor.

Watercourse varied since the pattern lease, 688. *Post*, III.

III. Usual and reasonable covenants.

To perform suit and service at the courts and pay fines.

Tenant for life, under the limitations of a devise, had power to lease, for term of years determinable upon two or three lives, any part of the premises usually so leased, so that there were reserved the ancient and accustomed rents and heriots of the premises therein contained, or more, and so that in every of the leases there were contained the usual and reasonable covenants.

1. Held that two tenements, which had previously been leased separately, might be leased together under a single demise, no objection being made that the rents, &c., reserved were not in proper proportion.

2. The pattern lease, of 1749, contained a covenant to do suit and service at the courts of the manor of W. (in which the premises lay), in such manner as the tenants of the manor were accustomed, and to pay all fines and amerciaments there imposed by reason of any just cause. A lease by the tenant for life, in 1831, contained a covenant to perform suit and service at the courts, but no covenant to pay the fines. In fact, since 1739, no court baron or customary court had been held; and there had been no freehold or copyhold tenant within legal memory.

Held, not a defective execution of the power; since, as there could no longer be a court baron or customary, a covenant to pay fines in such courts was not a reasonable covenant; and the Court would not assume, in order to avoid the lease, that there were other courts (as leet) of the manor; and, if they did so assume, would not hold that a covenant to pay fines there was reasonable.

3. The pattern lease contained a grant of waters and watercourses, excepting to the lessor "a watercourse flowing or descending from a head weir," erected on the premises, "in and through a meadow," "parcel of the premises," "and from thence conveyed by a trough into a meadow," "for watering and improving the same and other lands of" the lessor. At that time the weir forced the water of a natural stream to flow along an artificial trough, so as to irrigate lands of the lessor below. After 1749, M., a lessee, erected a mill above the weir, and used some of the water, which returned to the natural stream below the weir, and could not be used for irrigating the said lands below. Afterwards a tenant for life leased the premises, "together with so much of the water" as M. had "been accustomed to have," for working his mill, "also the use of the water descending from

the head weir," "except and reserving to the occupiers of the meadows watered by the said course running from the head weir," and thence by the trough, the right "to take the water for watering the meadows having the right thereto as heretofore accustomed."

Held: first, that the pattern lease did not except the channel over which the water flowed, but only subjected it to the easement; and therefore the last lease did not grant more land than the pattern lease: Secondly, that it was a question for the jury, whether the use of the water given by the last lease to the lessee was or was not larger than the use which the former lessee had under the pattern lease: and, they having found in the negative, that the lease was not a bad execution of the power. *Doe dem. Earl of Egremont v. Williams*, 688.

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2. What sort of interest passes, 702, 712. *Surrender*, I.

V. Surrender.

Failure of consideration or condition, 702, 712. *Surrender*, I.

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I. Of bill drawn at a certain time after date, 124. *Bills*, XII. 3.

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II. From corporation aggregate, not under seal, 127. *Corporation*, I. 1.

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II. What not adverse possession before stat. 3 & 4 W. 4, c. 27, 1036. *Adverse Possession*.

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II. When the proper remedy.

1. When there has been no hearing, or what is the same as no hearing, 483, 577. *Bishop*, II.

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To insert name in burgess roll, *quære* 260. *Post*, V. 2.

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1. When it must show title, 260. *Post*, V. 2.
 2. What allegations traversable, 260. *Post*, V. 2.

V. Return.

1. May set up several distinct answers, 260. *Post*, 2.

2. May traverse allegation in its exact terms.

Mandamus, to the mayor of D., recited that D. was a borough mentioned in sched. (A) of stat. 5 & 6 W. 4, c. 76; that, on 5th September, 1844, the "overseers of the poor of the parish" of C., part of which was within the

borough, made, signed, and delivered to the town clerk, a list of persons entitled to be enrolled in the burgess roll in respect of property within that part of C.; that L., on the last day of August, 1844, occupied a house within the borough, and within that part of C., and had occupied it during all 1842, 1843, and so much of 1844 as preceded 1st September; and, during the whole time of such occupation, was an inhabitant householder, &c.; and continued to occupy and be an inhabitant householder until and upon 5th September 1844; and "had been rated, in respect of the said premises," so occupied, &c., "to all rates made for the relief of the poor of" C., "during the time of his occupation as aforesaid;" and "had, before the said last day of August," 1844, "paid all such rates, including therein all borough rates directed to be paid under the provisions of" stat. 5 & 6 W. 4, c. 76, "as had become payable by him in respect of the said premises, except such as had become payable within six calendar months next before the said last day of August," &c.: that, on 5th September, 1844, "the said overseers" inserted L.'s name on the said burgess list, as a person entitled, &c., in respect of property within that part of C.: that a Court was holden to revise the burgess list, before W., the then mayor of D., and the then assessors, when the burgess list, so made out by the said overseers, was produced, and the said mayor expunged the name of L. from the said burgess list; by reason whereof the name of L. "hath not been enrolled in the burgess roll of the said borough for this year:" whereupon L., before the end of the term next following, applied for a mandamus to the mayor for the time being to insert the name of L. on the burgess roll. And the Court "having inquired into the title of" L. "to be so enrolled, do command you, the mayor" of D., "to insert the name of" L. "upon the burgess roll of the said borough for this year," or show cause to the contrary: teste, 31st January, 1845.

Return, of 15th April, 1845, by W., the same mayor. (1.) That, before and at the time of the making and signing the said list, there were two overseers of the poor of the parish of C., who were the overseers in the writ mentioned; and that they, and no other person, made and signed the list; that, at the time of making the list, there were two churchwardens of C., neither of whom made out and signed the list, or interfered in so doing; and that there was no other burgess list for C. (2.) That L. had not, before the last day of August, 1844, "paid all such rates as in the said writ in that behalf mentioned, including therein all borough rates directed to be paid

under the provisions of" stat. 5 & 6 W. 4, c. 76, "as had become payable by him in respect of the said premises in the said writ in that behalf mentioned, except such as had become payable within six calendar months next before the said last day of August," as alleged in the writ. (3.) That a sum, to wit, &c., being so much of a certain borough rate for the borough, heretofore, to wit, on 6th February, A. D. 1843, made and directed to be paid under the provisions of the same last-mentioned act, as had become payable by him in respect of the said premises so by him occupied as in the writ mentioned, and which had not become payable within six calendar months next before the said last day of August, and which had become payable by him in respect of the same premises on a day before the commencement of the said six calendar months, to wit, on 1st May, 1843, was, on and after the said last day of August, 1844, wholly due and unpaid, and was then and afterwards, and until and upon and after 5th September, 1844, in arrear from L. "For which said causes I" "have not inserted, nor ought I to insert, the name," &c.

1. Admitted, that the time of making the rate mentioned in the third part of the return sufficiently appeared, though laid under a videlicet. On special demurrer.

2. Held, by the Court of Queen's Bench, that the first part of the return was bad on general demurrer, the mayor not being entitled to rely on the general badness of the burgess list, after having, as appeared by the writ, treated it as valid by expunging a single name therefrom. Also, that the defect (supposing it to be one) in the signing of the burgess list did not, in itself, furnish an answer to the writ.

3. Held by the Court of Exchequer Chamber, affirming the judgment of Q. B., that the second part of the return was good, though specially demurred to for generality and uncertainty, inasmuch as it directly traversed the corresponding allegation of title in the writ. Though it did not appear by the record that L. had been objected to on the revision.

4. Held, by the Court of Q. B., that the third part of the return was bad on special demurrer, for not giving the date nor specifying the nature of the rate there mentioned.

Quære, per Lord DENMAN, C. J., where a party applies to have his name inserted in the burgess roll under stat. 7 W. 4 & 1 Vict. c. 78, s. 24, whether the Court, if satisfied of his title upon affidavit, ought not to award a peremptory mandamus in the first instance. *Regina v. Mayor of Dover*, 260.

3. Estoppel by conduct, 260. *Antd*, 2.

4. When not sufficiently certain, 260. *Antd*, 2.
5. Special demurrer to, 260. *Antd*, 2.

VI. In particular instances.

1. To insert name on burgess roll, 260. *Antd*, V. 2.
2. To hear objections to confirmation of bishop elect, 483. *Bishop*, II.

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2. Of return, 260. *Antd*, V. 2.
3. Of judgment on demurrers decided some for one party, some for the other, 260. *Antd*, V. 2.

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I. Court Baron.

Failure of for want of freeholders, 688. *Lease*, III.

II. Court Leet.

1. Whether comprised in a covenant to do suit and service at the lord's courts, 688. *Lease*, III.
2. Covenant to pay fines imposed by, not usual or reasonable, 688. *Lease*, III.

III. Freeholders of manor.

A tenure which cannot now be created, 688. *Lease*, III.

MANU FORTL

Page 890. *Force*, I. L. 904. *Trespass*, I. L.

MARRIAGE.

I. Who may marry: prohibited degrees.

1. Where they are declared.

Stat. 5 & 6 W. 4, c. 54, s. 2 (passed 31st August, 1835), enacts that all marriages which shall thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be null and void.

The prohibited degrees are those declared by stat. 28 H. 8, c. 7, s. 11, to be prohibited by God's law.

Consequently, the marriage of a man with the sister of his deceased wife is prohibited, and void by stat. 5 & 6 W. 4, c. 54. This law extends to an illegitimate as well as to a legitimate child of the late wife's parents. *Regina v. Chadwick*, 173.

2. Sister of deceased wife, 173. *Antd*, 1.
3. No distinction as to illegitimacy, 172. *Antd*, 1.
4. To what the statute nullifying such marriages applies, 173. *Antd*, 1.

II. Rights and interests. *Baron and Feme*.

MASTER AND SERVANT.

I. The contract of hiring.

General hiring, or hiring for a year, not determinable on notice.

Assumpsit. The first count stated that, in consideration plaintiff would enter into defendant's employ, and serve him, as servant in husbandry, for a certain time, to wit, from a day named till the service should be determined by reasonable notice on either side, at 10*l.* 10*s.* per annum, defendant promised to retain plaintiff, and pay him the wages, and continue him in the service till such determination: that plaintiff entered the service, and was always ready, &c., but defendant discharged him without reasonable cause, and refused longer to retain him.

Held that proof that the plaintiff was hired generally as a labourer in husbandry did not support this count, on a plea of Non assumpsit, such hiring being in law a hiring from year to year.

To the same count defendant pleaded two justifications: first, that plaintiff, being ordered by defendant to reap a corn field till eight in the evening, refused to continue at the work after four in the evening, and, wrongfully and in breach of his duty and the command, absented himself, wherefore the defendant discharged him from his service: secondly, that plaintiff unlawfully quitted his work before it was completed, in breach of his contract, and defendant made complaint thereof before a magistrate, who found plaintiff Guilty and discharged him from the service according to stat. 4 G. 4, c. 34, s. 3. Replication, De injuriâ. Plaintiff, at the trial, set up an excuse for quitting the work, which failed in fact; and the facts in the two pleas were proved.

Held that defendant was entitled to a verdict, not only on those two pleas, but on a plea of Non assumpsit to a count in indebitatus assumpsit for work and labour, the evidence showing an open contract rescinded by the misbehaviour of plaintiff, and, therefore, no wages being due rateably.

That the replication to the second justification put in issue the misconduct of plaintiff, as alleged, as well as the magistrate's decision.

And that the facts proved did not support a plea to the first count denying the discharge by defendant. *Lilley v. Elwin*, 742.

II. Liability of master for acts of servant.

For fire occasioned by servants, 347. *Fire*, II.

III. Offences by servants.

I. Conspiracy by servants to defraud master by using his materials for other persons, 929. *Conspiracy*, I. 2.

2. Unlawfully quitting work, 742. *Antâ*, I.

3. Commitment for absention from service, 455. *Commitment*, I. 1

IV. Discharge.

1. By master through medium of proceeding before magistrate, how pleaded, 742. *Antâ*, I.

2. Wages when not apportioned, 742. *Antâ*, I.

V. Pleading and evidences.

1. On discharge for improperly leaving work, 742. *Antâ*, I.

2. Replication, de injuriâ, what it puts in issue, 742. *Antâ*, I.

MATERIALITY.

In indictment for perjury, 781. *Attorney*, VII. 1.

MAXIMS.

I. Expressio eorum quae tacitè insunt nihil operatur, 130. *Tender*.

II. Expressum facit cessare tacitum, 1038. *Adversus Possession*.

III. Omnia præsumuntur ritè esse acta, 68. *Poor*, IV. 1. 325. *Debtor*, II. 997, 1015. *Witness*, I.

MERGER.

Of misdemeanor in felony.

Conspiracy, when it does not merge in felony committed in pursuance thereof, 929. *Conspiracy*, I. 2.

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Archbishop.

METROPOLITAN POLICE COURT.

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By deceased officer, 678. *Poor*, VI. 2.

MISCONDUCT.

Contract rescinded for, 742. *Master and Servant*, I.

MISDEMEANOR.

I. Nomen collectivum, 781. *Attorney*, VII. 1.

II. Merger, 929. *Conspiracy*, I. 2.

MONEY HAD AND RECEIVED.

I. Money paid by principal to agent to meet liabilities incurred for principal, 13. *Broker*, I. 1.

II. When it does not lie against attorney's agent, 248. *Attorney*, IV. i.

MONTH.

I. Lunar or calendar, 23. *Construction*, III. 1.

II. Meaning of the word in proceedings on statutes, 781. *Attorney*, VII. 1

MORTGAGE.

1. Lease by mortgagor and mortgagee.

1. Who the proper party to sue for rent.

Declaration in covenant for non-payment of rent, alleged: That Y. being tenant of premises for a term of 5000 years (from June 1815), by indenture made between Y., and S., and one L. under whom defendant claimed, after reciting a previous mortgage of the residue of the said term to S. subject to redemption on payment by Y. to S. (not stating covenant to pay, or any day named for payment) of 1200*l.* with interest, which was still due, and reciting that Y. had requested S. (the mortgagee) to join in the present indenture of demise; it was witnessed that S. thereby demised, and Y. (the mortgagor) confirmed to L., his executors, &c., and assigns, the said premises for 4000 years, a portion yet unexpired of the term of 5000 years, yielding, &c., to S. (the mortgagee), his executors, &c., and assigns, during the continuance of the recited mortgage, and, after payment and satisfaction thereof to Y. (the mortgagor), his executors, &c., or assigns, the yearly rent of, &c., payable on 28th March and 29th September in each year. The declaration then stated a covenant by L. to S., his executors, &c., and also to Y., his executors, &c., to pay the rent as reserved: assignments by deeds under the seal of S., to one G. of all S.'s interest: and assignments afterwards from G. to the plaintiff by two deeds under the seal of G., conveying successive moieties of the whole: the first deed executed, to wit, 18th February, 1835; the second, to wit, 15th December, 1842: whereby plaintiff "became and was and is possessed" of the demised premises for all the residue of the term of 5000 years, subject to the demise. The declaration then alleged an assignment of all the interest, &c., of L., the lessee, to defendant. Breach, that after the making of the demise, and during the term of 4000 years, and while defendant was assignee, to wit, on 25th March, 1844, a sum, to wit, &c., of the said rent for two years of the said term of 4000 years then last elapsed became due and in arrear to plaintiff, and the same was not paid to plaintiff or any other person.

Plea: That, before any part of the arrears of the rent became due, and during the continuance of the mortgage, to wit, on, &c., S. (the mortgagee) was paid and satisfied all the principal and interest due to him under the mortgage, amounting, &c., out of money arising from the absolute sale of part of the premises, and, when paid to the mortgagee, equal to the amount of such principal, &c.: and that afterwards, to wit, &c., by indenture to which the mortgagor and mortgagee were parties, S. (the mortgagee) acknowledged that

he had been paid the whole principal and interest due to him on the mortgage, out of moneys arising from such sale, and released Y. (the mortgagor) from all claims under the mortgage.

On special demurrer to the plea:

Held, by the Court of Queen's Bench, that the plea, by its first averment, set up such a payment as would put an end to the continuance of the recited mortgage within the meaning of the indenture of demise; so that S. the mortgagee (from whom alone the Court considered the plaintiff's title to be deduced) could no longer demand the rent. But that, a distinct answer being offered by the averment, in the plea, of a release by deed, it was bad for duplicity.

That the action was properly brought by the party claiming through the mortgagee, without joining the mortgagor.

That, the alleged mortgage being for an ascertained term of years, it was not necessary to aver in the declaration that the mortgage term continued: but *Seem* that, if the averment were necessary, it was sufficiently made, the objection being taken as on general demurrer.

That it was not necessary to aver in the declaration continuance of the mortgage debt, for that payment of the debt was a condition subsequent, and in defeasance of the mortgagee's right to recover the rent.

That the declaration sufficiently showed (there being no special demurrer) that the rent sued for accrued after plaintiff became assignee of the term of 5000 years.

The Court of Exchequer Chamber, on writ of error, affirmed the judgment and held,

That the plea was bad for duplicity, the payment and release being distinct answers; for, the record not showing any covenant to pay the mortgage debt, it did not appear that a release was necessary to complete the discharge by payment.

That the plea was also bad for not showing with certainty that the original mortgage debt had been paid; or that the release had not been executed by S., the mortgagee, after he had assigned the premises.

That the action was brought by the right party, the covenant to pay rent *not* becoming a covenant in gross till after payment of the mortgage debt.

That the payment was a condition subsequent, and the plaintiff not bound to aver non-performance of it.

That the rent sufficiently appeared to have become due after the assignment to plaintiff, because the dates, being material, must be deemed correct, though laid under a *videlicet*; and by them the plaintiff appeared enti-

tled to some rent for two years since the assignment; and the Court of error could not inquire whether the Court below had awarded as damages more than the precise amount of rent due. *Harrold v. Whitaker*, 147.

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1. Presumption as to non-emancipation.

An order of removal began: "Whereas complaint hath been made to me, B. C., one of the magistrates of the Police Courts of the Metropolis, sitting at the Clerkenwell Police Court within the Metropolitan police district," &c.: and it ended "Given," &c. "at the Police Court aforesaid, this 29th day," &c. Held, that the order sufficiently appeared to have been made at a Police Court established under stat. 3 & 4 Viet. c. 84, and therefore showed jurisdiction in the magistrate, singly, to make such order, under stat. 2 & 3 Viet. c. 71, s. 14.

By the examinations it appeared that in 1816 the pauper was residing with his father as part of his family in parish H., being then five years old; and that, in 1816, the father acquired a settlement in H.: but it was not expressly stated that, at that time, the pauper was resident with him or unemancipated. The father continued to reside in H. for several years afterwards. Held that, in the absence of contrary proof, the Sessions might properly assume that the pauper continued a member of his father's family and unemancipated, after the settlement was acquired. *Regina v. Hammermith*, 391.

2. Non-emancipation not presumed.

Examinations showed that the pauper was living in parish L. as a member of his father's family, unemancipated, till 1812, when he married. And that, in 1824, the father, then resident in parish B., received relief from L. Held, that the examinations did not show a derivative settlement of the pauper in L. *Regina v. Bangor*, 399.

IV. Settlement: parish apprenticeship.

1. What number of parish officers may bind.

A binding of a parish apprentice by a churchwarden and one of two overseers of a township, is good.

The recital in a parish indenture of an order for binding is sufficient primary evidence before removing justices that such order was made.

An indenture produced before removing justices, had at the foot an allowance by C. and L., "justices of the peace for the West Riding." The order for binding, as recited in the indenture, appeared to be "made by" C. and L. (the same names), "justices of the peace in and for the said Riding."

Held, that the allowance was sufficient: inasmuch as such allowance is merely an act personal to the magistrates, and the place where it is signed need not appear on the instrument. *Regina v. Stainforth*, 66.

2. Notice to overseers, when necessary: in *Regina v. Totness*, 88.3. Order for binding: prima facie evidence of, 66. *Antd*, 1.4. Allowance by same justices need not set forth place, 66. *Antd*, 1.

5. Allowance, when not presumed.

On appeal against a removal grounded on a settlement by binding as apprentice from parish S. in the West Riding of Yorkshire to parish T. in Lancashire, the evidence was the order of justices for putting out the apprentice to a master resident in T.; an indenture, executed by the master, and allowed by two justices of the West Riding; and a service by the pauper under the master in T. The sessions having quashed the order, subject to a case which raised the question whether there was evidence sufficient to raise the presumption that the indenture had been executed by the officers of S. and allowed by justices of Lancashire: This Court held that there was no evidence which made it necessary to adopt that presumption rather than the opposite: and therefore they confirmed the order. *Regina v. Macclesfield*, 78.

6. Allowance by justices of the other county must set forth place.

All judicial acts by persons whose authority is limited as to locality must, on the face of them, purport to be done within the locality.

The act of justices in determining on the propriety of making an order to bind a parish apprentice, under stat. 56 G. 3, c. 139, is judicial; but, on execution of the indenture, their allowance, under sect. 1, in pursuance of the order previously made, is not a judicial act, and consequently need not purport to be

executed within the jurisdiction of the justices signing it.

Where the justices act, under sect. 2, for the place in which the child is to serve, they determine on the propriety at the time of allowance; and consequently an allowance under sect. 2 is a judicial act, and must, on the face of it, purport to be executed within the jurisdiction of the justices signing. *Regina v. Totness*, 80.

V. Settlement: by hiring and service.

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VI. Settlement: order of removal unappealed against.

1. What documents to be sent, 62 n., 65 n. *Post*, X, 3, 5.

2. What is evidence of the execution of the order.

To prove before removing justices the execution of a former order of removal directed to parish D., it was stated in the examinations that an overseer, after obtaining such former order, employed T. G., since deceased, to execute it: and that, after T. G. returned from removing the paupers, he signed the following endorsement on the order: "Delivered to W., overseer of D., June 23, 1826, by T. G." Held that, on the whole statement, there was some evidence on which the justices might presume an execution of the order.

On trial of an appeal against the order founded on these examinations, it appeared in evidence that the endorsement was signed by T. G., a person employed as above, the signature only being in his handwriting: and that, on the morning of the alleged removal, the paupers were seen going with T. G. from the removing parish for the purpose of proceeding to D. On a question reserved for this Court, whether the endorsement was receivable in evidence, and whether without it there was evidence from which the sessions might infer execution of an order of removal: Held that, if it was assumed on both sides at sessions that such endorsement usually followed the delivery of paupers under an order, the endorsement was properly received in evidence, as a thing done in the usual course of duty. But that, without the endorsement, there was evidence from which execution of the order might be inferred.

The appellants, at sessions, relied upon the quashing of a former order of removal, relating to the same paupers, on the trial of an appeal between the same parishes. The entry made by the Court as to that order was, that it was quashed by consent of parties, for the "informality and insufficiency of the examinations." The sessions having, on the subse-

quent appeal, decided, subject to the opinion of this Court, that the order was quashed on grounds which did not make the quashing conclusive: Held that the sessions had a right to decide this on consideration of the circumstances before them, and that this Court ought not to interfere with their finding. *Regina v. Dufayfield*, 678.

3. Endorsement by deceased officer, 678. *Antd*, 2.

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2. Insufficient, 399 n. *Antd*, III. 2.

VIII. Order of removal: formal parts.

Jurisdiction to act as single justice when sufficiently shown, 391. *Antd*, III. 1.

IX. Removal: notice of chargeability.

Signature by majority.

Where a notice of chargeability, under stat. 4 & 5 W. 4, c. 76, s. 79, is signed by A., B., and C., styling themselves "overseers of the poor" (but not "the" or a "majority of the" overseers) of parish D., and it does not appear, by evidence on trial of the appeal, that they are not all or a majority of the overseers, the notice is sufficient. *Regina v. Osborne*, 909.

X. Removal: copies of examinations.

1. Of all documents used in evidence.

Under stat. 4 & 5 W. 4, c. 76, s. 79, if documentary evidence be used before removing justices, the documents, or copies, must be sent to the parish receiving notice of the order of removal. And this, whether the pauper be removed at the time or not.

Examinations sent with an order of removal showed a complete settlement, by hiring and service, in the parish served with the order: they also showed that the pauper had formerly (after becoming so settled) been removed by order of justices from the parish now removing to the parish served with the present order: and that the former order was produced before the now removing justices. The former order was described, in the examination of the officer who had executed it, by the date, name of pauper, and names of justices: but no copy of such order was sent with the examinations. Appeal, on the ground that no copy or extract of such last-mentioned order had been sent:

Held (on a case stated by the sessions, which had confirmed the present order of removal), that the objection was fatal, and that the respondents ought not to have been heard at sessions. *Regina v. Mylor*, 55.

2. When to be sent, 55, 62. *Antd*, I. Post, 3.

3. Partial description not sufficient.

A pauper was removed from G. to R. on examinations showing a settlement by hiring

and service in R. under a colliery bond. It appeared, by the depositions, that the bond was produced before the removing justices; but the contents of it, though partially described in the examinations, were not embodied in them; nor was any copy sent with them to the overseers of R.

Held, that the sending of such examinations only was not a sufficient compliance with stat. 4 & 5 W. 4, c. 76, s. 79.

And that the omission was not cured by a copy having been sent after service of grounds of appeal but before trial. *Regina v. East Rainton*, 62 n.

4. Excuse for not sending, 62. *Antd*, 3.

5. Of document produced in support of the settlement.

Where the parish applying to remove a pauper proves before the justices a former removal, acquiesced in, to the parish now about to be charged, and produces the order of removal, such order, or a copy, must be sent to the latter parish, under stat. 4 & 5 W. 4, c. 56, s. 79. *Regina v. Wellington*, 65 n.

XI. Appeal against order of removal: statement of grounds.

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XII. Appeal against order of removal: special entry.

1. Sessions, how far the judge of what is conclusive, 678. *Antd*, VI. 2.

2. Quashing for the "informality and insufficiency of the examinations," 678. *Antd*, VI. 2.

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I. Adverse. *Adverse Possession*.

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The condition in a replevin bond, to prosecute the suit without delay, may be broken by a delay which does not exceed the time

allowed by the ordinary practice of the courts if the defendant in replevin be unduly prejudiced by such delay.

Where, therefore, a plaint in replevin was removed into the Superior Court on 2d November, and the plaintiff obtained several successive orders for time to declare, and did not declare until 30th April following: Held, in debt on the replevin bond, that there was evidence for a jury of delay in prosecuting the replevin.

A declaration in debt on a replevin bond stated the bond, the removal of the plaint, declaration in replevin, and avowry, and then alleged that the obligor did not prosecute his affidavit suit without delay; but, on the contrary thereof, delayed its prosecution for a long and unreasonable time, and until the obligor, ~~being~~ after a reasonable time had elapsed for the trial, died before issue joined. Held, that the language of the breach did not confine the plaintiff to the proof of delay between the avowry and death of the obligor, and that the plaintiff was at liberty to prove a delay in declaring. *Grant v. Cutts*, 288.

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VII. Case for taking insufficient sureties: pleading.

Averment of insufficiency.

In an action against the sheriff for taking insufficient sureties to a replevin bond, under stat. 11 G. 2, c. 19, s. 23: Held, on motion for a new trial, after verdict for plaintiff,

1. That the execution of the bond was sufficiently proved without calling any attesting witness, the assignment being in evidence.

2. That the declarations and acts of the replevin clerk at the time of his taking the bond were evidence against the sheriff, though there

was no proof, except from those declarations and acts, that the person was replevin clerk at the time.

3. That a *f. fa.*, executed in an action for use and occupation brought by the now plaintiff against the plaintiff in replevin, to recover the rent which had been distrained for, was evidence in an action against the sheriff, to show that, such execution having been unproductive, the plaintiff had failed to obtain satisfaction of the rent after the taking of the bond; though the plaintiff in replevin was no party to the present action.

4. That no objection arose from the plaintiff in replevin having omitted to levy his plaint till the next county court but two after he had replevied, though the declaration averred that he had levied his plaint, "to wit, at the then next county court," and issue was taken on the averment.

5. That the plaintiff, having brought actions against the sureties (without notice to the sheriff), which actions had proved unproductive, might recover the costs from the sheriff, their amount not exceeding, with the other damages proved, the penalty of the bond.

6. The Judge having left it to the jury to say whether the defendant had used due care and exercised reasonable discretion in inquiring into the sufficiency of the sureties: That the question was for them, and was properly left.

7 and 8. On motion in arrest of judgment. That the declaration was good, though it alleged only that the sureties were insufficient, making no such averment as to the plaintiff in replevin, who also was party to the bond.

And though it did not allege want of reasonable care on the part of the defendant, but merely stated as breach the insufficiency of the sureties. *Blumer v. Brisco*, 46.

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3. A continuing court, 799. *Indictment*, I. 1.

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Under the Victuallers' Licensing Act, 9 G. 4, c. 61, the sessions hearing an appeal against the refusal of justices to grant a license cannot adjourn such appeal to a subsequent session for the purpose of awarding costs there after a taxation in the interval.

So held on the construction of sects. 27 and 29; but without impeaching the authority of

Courts of General or Quarter Session to adjourn a case from one session to another when no statute interferes. *Regina v. Bolton*, 379.

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To a declaration, the first and second counts of which severally charged defendant as maker of two promissory notes and the third count as acceptor of a bill of exchange on which it was averred that 15*l*. remained unpaid, with counts for money lent and on an account stated, defendant pleaded, inter alia, special pleas to the counts on the promissory notes and the money counts, which on the trial were found for him, and a plea of set-off to the whole declaration, to which the plaintiff replied Not indebted. Plaintiff by his particulars claimed in respect of the bill of exchange 16*l*. only, and defendant, under his plea of set-off, proved that plaintiff was indebted to him in more than 15*l*., but not to an amount which would cover that sum together with the amount of the promissory notes in the first and second counts.

Held, that defendant was entitled to the verdict on the issue joined on the plea of set-off, but that it ought to be entered specially, "that the plaintiff before and at the time of the commencement of the suit was indebted to the defendant in a larger sum than the sum of 15*l*;" and that upon such verdict defendant was entitled to judgment on the whole record. *Ford v. Beech*, 842.

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Mortgages and transfers.

New security for old loan: new parties.

A., being tenant in fee of land, mortgaged for a term to secure 150*l.*, and afterwards died, having devised the land to B. for life remainder to C. in fee. Afterwards, B. and C. borrowed from Z. 165*l.*, to pay off the principal and interest, and also 185*l.* more; and the mortgage, by assignment, to which B. and C. were parties, assigned the term to Z., as a security for the whole 350*l.*: and B. and C. covenanted for the payment of the whole 350*l.*

Held that the deed required, besides an ad valorem stamp on the 185*l.*, a stamp in respect of the covenant of B. and C., since they became, by the deed, absolutely liable to the payment of the 165*l.*, which otherwise they would not have been without assets; and the covenant, as to such liability, could not be considered as merely incident to the assignment in respect of the old loan or the new security for the new loan. *Doe dem. Crawley v. Gutteridge*, 409.

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I. Consideration.

1. Surrender avoided if grant in consideration avoided.

Tenant in fee demised the land by indenture for a term depending on certain lives, and then devised his estate to his son for life, with remainders over, and with a power to tenant for life to grant leases. After testator's death, and during the above term, the son granted the lessee a fresh lease of the land, and the new indenture of lease set forth that it was granted in consideration of the surrendering up into the hands of the lessor by the lessee, at or before the delivery thereof, of the lease first granted, *which surrender is hereby made and accepted accordingly*. The new lease was a bad execution of the power. One of the lives mentioned in the first lease was still existing.

Held, that the surrender was inoperative, and the first lease remained in force; and this, whether the second lease, at the time of the demise, was void or only voidable at the will of the tenant for life, and whether the surrender was implied or express: the ground of decision being that the new lease did not pass an interest according to the contract, and therefore the acceptance of it, though with express words as above stated, did not effect an absolute surrender. *Doe dem. Earl of Egremond v. Courtenay*, 702.

2. Surrender not absolute, if grant in consideration voidable.

Tenant for life, with a leasing power, demised premises, in 1784, for ninety-nine years, on three lives. In 1788, the lessee being desirous to sell his term in part of the premises, it was arranged that the lessor should grant to the intended vendee a lease of this parcel, and grant the original lessee a fresh

lease of the unsold residue. Indentures of lease were executed accordingly. The first lease to the original lessee purported to be made in consideration of the surrender of the prior lease, and granted a term of ninety-nine years, on the same three lives, to commence from the date of the fresh lease. This lease was not a due execution of the power; but the premises were held under it till 1845, when ejectment was brought by parties in remainder, the lives not having terminated.

Held, that the acceptance of the fresh lease, which had been avoided contrary to the intention of the parties thereto, and had thus failed to pass the interest contracted for, was not in itself a surrender of the prior lease, but worked no more than a surrender conditioned to be void if the new grant should fail. *Doe dem. Biddulph v. Poole*, 713.

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Absolute or conditional.

A tender is valid if it implies merely that the party offers a given sum as being all that he admits to be due: but, if it imply also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient.

A tenant sent to his landlord 28*l.* with a letter in these words: "I have sent with the bearer 28*l.* to settle one year's rent of Nant-y-pair." Held a good tender. *Brown v. Owen*, 130.

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Of commission to examine witnesses, 1006. *Witness*, I 3.

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I. In pleading. *Pleading*, XXI.

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TRESPASS.

I. Action of.

1. Owner of a building may pull it down, though an intruder is inhabiting it.

To a declaration in trespass, charging that defendant broke and entered plaintiff's workshop while plaintiff was inhabiting and present in it, and, while plaintiff was so inhabiting and present, pulled it down, defendant pleaded pleas asserting that the workshop was defendant's, and denying that it was plaintiff's.

Held that, on issues joined upon these averments, it was immaterial whether plaintiff was or was not inhabiting and present at the time of the alleged trespass; and that defendant was entitled to the verdict upon proof that he had a right to the soil. *Burling v. Bond*, 904.

2. How an action of trespass qu. cl. fr. differs from an action of forcible entry, 890. *Force*, I 1.

II. Prescription: thirty years' enjoyment as of right.

What put in issue by simple traverse, 666. *Evidence*, XVIII 3.

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2. Mannu forti and expulsion, when mere aggravation, 890. *Force*, I 1.

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WITNESS.

I. Commission to examine.

1. Place.

Where a commission issues, under stat 1 W. 4, c. 22, s. 4, for the examination of witnesses abroad, the place of examination must be specified in the rule or order authorising the commission, or in some subsequent rule or order. And examinations taken under such commission are inadmissible in evidence, if the order be produced, omitting to specify place, though the commission itself, under the seal of the Court, contain all necessary particulars. *Graville v. Smith*, 997.

2. Sufficiency of order as to time, place, and manner.

A Judge's order, in December 1845, directed a commission to issue for the examination of certain witnesses *viva voce* at Newfoundland, returnable on the last day of Trinity term next.

The commission, issued in pursuance of this order, was addressed to certain Commissioners described as "of St. John's in the island of Newfoundland," and commanded that, "at a certain day and place or certain days and places to be appointed" by them,

they should cause the witnesses to come before them "at Newfoundland, and then and there examine each of them the said witnesses apart."

The commission was sent by post to the said Commissioners, in the beginning of 1846. At the end of May 1846, a sealed packet was left at the Master's office by a person not known: it contained the commission, and return to it, and the examinations of the witnesses signed by the persons named as commissioners, who were proved to have been living at St. John's, Newfoundland, where the return purported to have been made, seven years before the alleged return, and three or four months after it.

The return and examinations were produced in the same state as when left at the Master's office, and bore no mark of alteration.

Held, that the order gave sufficient directions as to the time, place, and manner of examinations, under sect. 4 of stat. 1 W. 4, c. 22, and that the commission was warranted by the order.

That there was sufficient proof of the return, without further evidence to show that the examinations were in the same state as when sent forth by the Commissioners.

That it must be presumed that the witnesses were examined apart.

Debt, on a decree on the equity side of the Supreme Court of Newfoundland. Plea, that the decree was made in respect of matters stated in a certain amended bill; that, at the time of filing this bill, defendant was, and thence hitherto hath been, and still is, resident out of the jurisdiction of the said Court; that he was never served with any copy of the amended bill, and never had notice of any process calling upon him to answer it; and that the proceedings on it were taken in his absence and ex parte.

Replication. That, at the commencement of the suit, defendant was within the jurisdiction, and was duly served with process to answer the original bill, which was the bill afterwards amended. That defendant afterwards, and while he was within the jurisdiction, appeared, and appointed E. to be his attorney in the suit, and E. became his attorney authorized to conduct his defence therein; and was, during all the time after mentioned, within the jurisdiction; that afterwards, while E. was such attorney for defendant, and so authorized, the original bill was amended; that afterwards, and before decree,

and while E. continued to be such attorney and so authorised, E. had notice of the amended bill, and was served with process calling upon defendant to answer the amended bill; and such proceedings were thereupon had, that the decree was made.

Rejoinder. That E. had not notice of the amended bill, modo et forma. Issue thereon.

Held, that this rejoinder did not put in issue the service of process to answer the amended bill, or anything except notice of the bill.

That the replication was good after verdict, as the meaning of the replication was that E. had authority from defendant to act as attorney for him in respect of the amended, as well as of the original, bill; and that defendant, by pleading over to this allegation, and merely traversing the notice to E., admitted that the replication was to be taken in the sense in which it must have been intended, viz. that which made the replication valid; and that the authority, understood in this sense, would support the decree, whatever might have been the practice in Chancery in respect of an ordinary retainer of an attorney to appear to an original bill. *Sims v. Henderson*, 1015.

3. Names.

Under stat. 1 W. 4, c. 22, s. 4, the order of a Judge for issuing a commission to examine witnesses in places out of the jurisdiction of the Court need not contain the names of the commissioners. The names of such commissioners as the parties agree upon may be inserted in the commission.

The commission need not be tested in term. *Nicol v. Alison*, 1006.

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6. Presumption as to mode of examination, 1015. *Antd*, 2.

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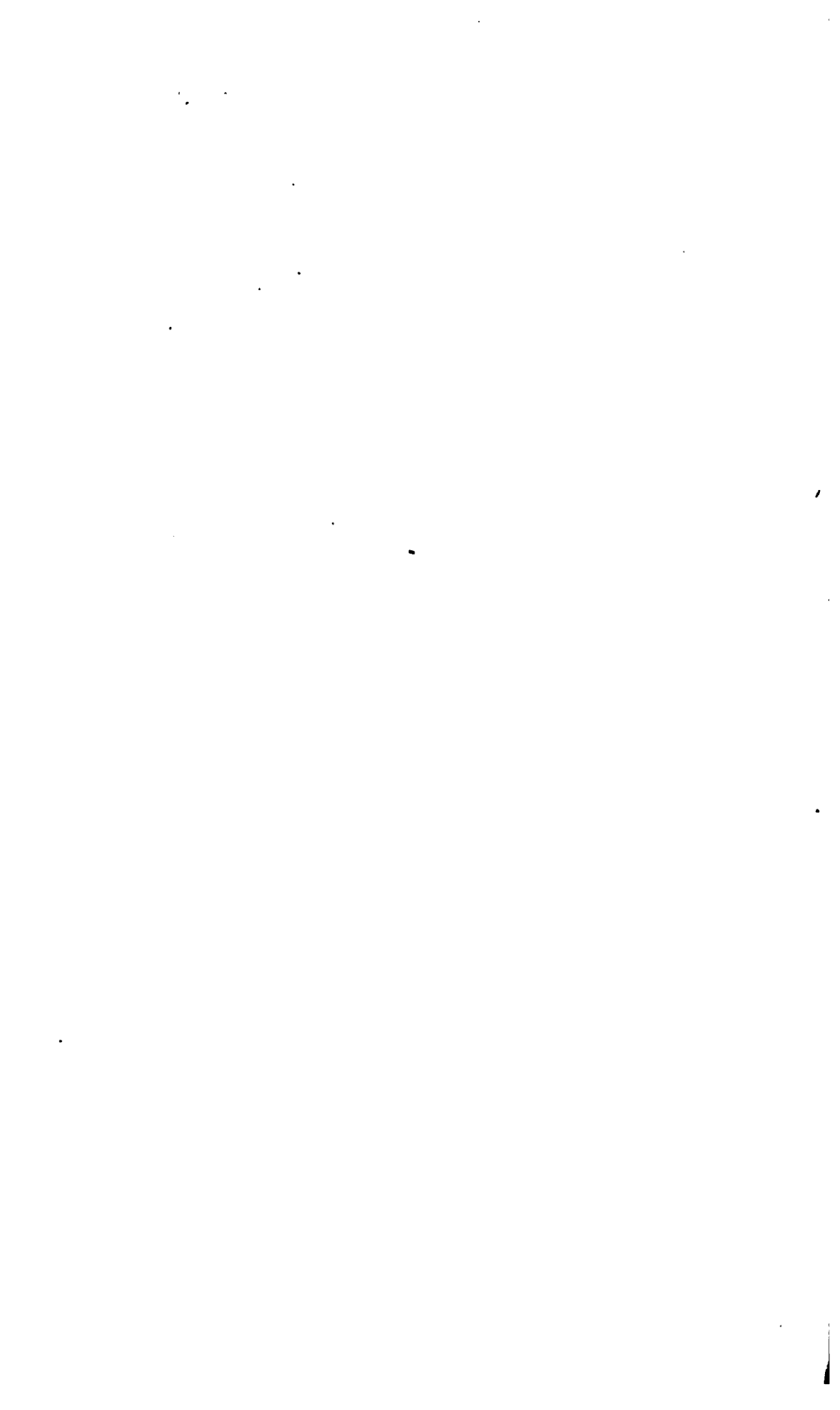
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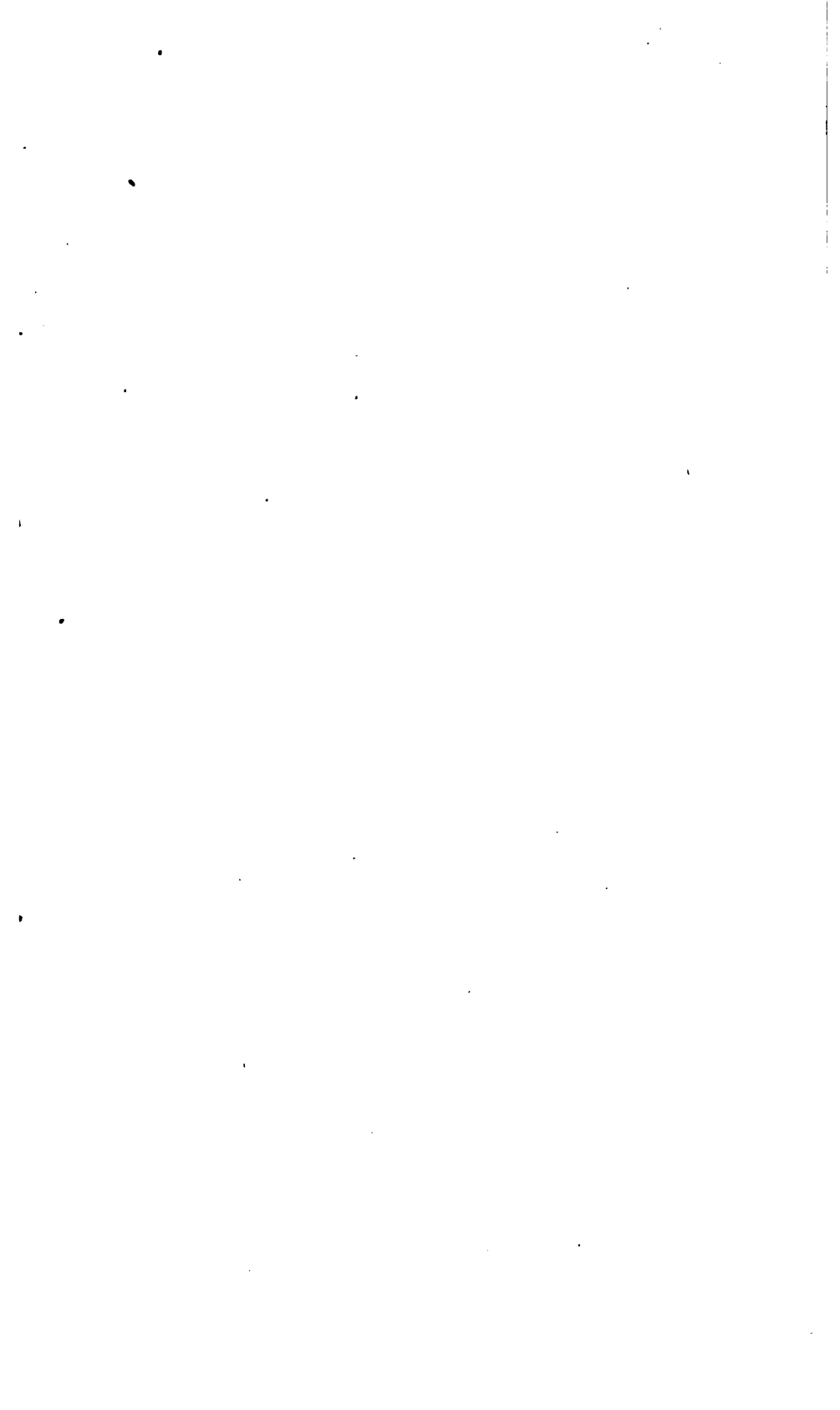
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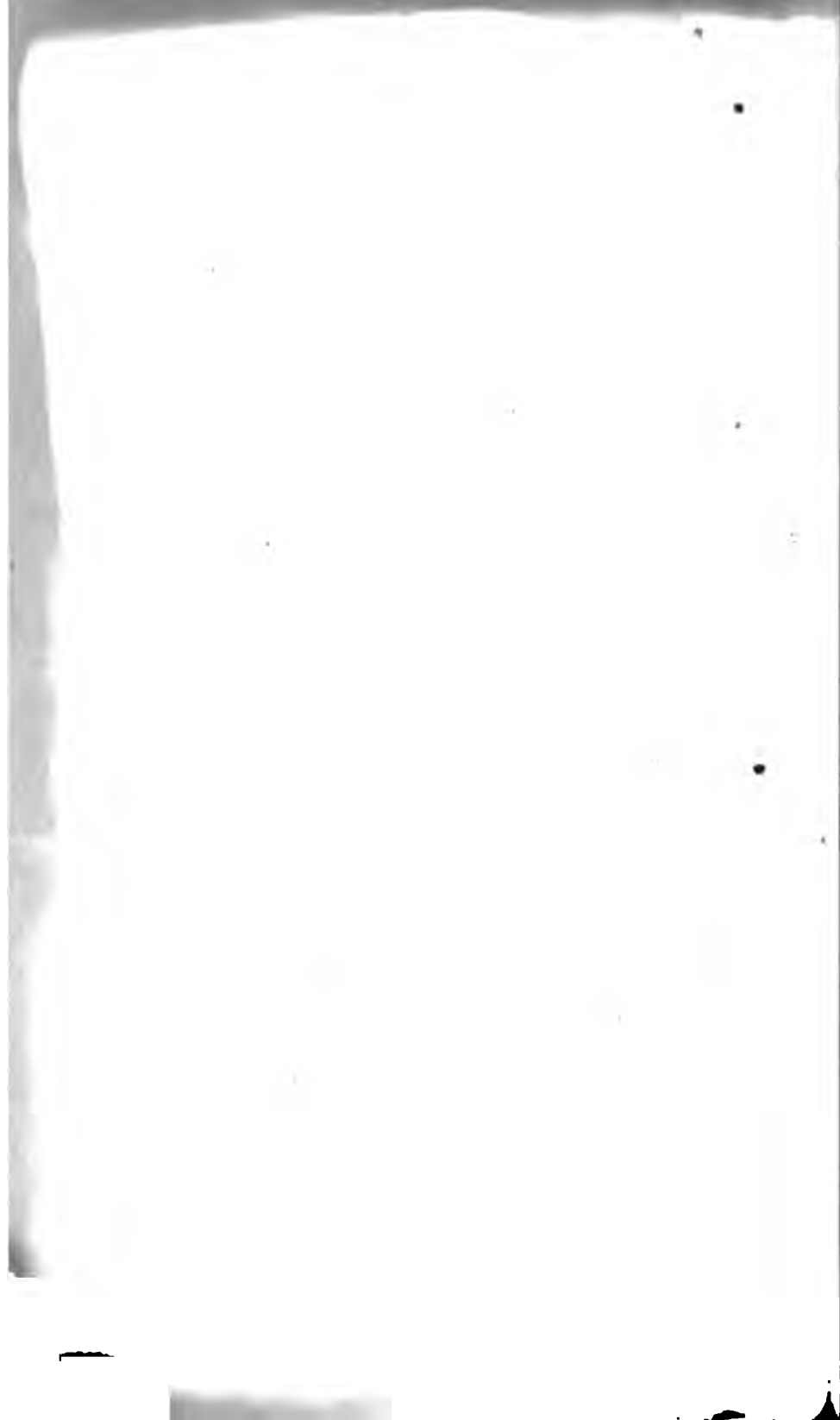
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